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In The

Supreme Court of the United States

October Term, 1994

ALFRED NELSON, EVELYN NELSON,
LEWIS HICKS, III, AND BERNICE HICKS,

Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS AND
TOWN OF CHATHAM, INTERVENOR,

Respondents.

**Petition For A Writ Of Certiorari
To The Supreme Judicial Court
For The Commonwealth Of Massachusetts**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether exhaustion of administrative remedies is required where substantial property rights are involved, delay is extraordinary and the remedies do not meet minimum constitutional standards.

Whether a state may prohibit seawalls without showing they would constitute a nuisance at common law.

Whether flooding caused by such a prohibition is an invasion and taking by government.

Whether the state may impose regulations that substantially diminish the value of private property without showing a "substantial relationship" to a valid state purpose.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Alfred Nelson, Evelyn Nelson, Lewis Hicks, III and Bernice Hicks, and the Respondents, the Commonwealth of Massachusetts and the Town of Chatham, which intervened.

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Petition For A Writ Of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

The Petitioners Alfred Nelson, Evelyn Nelson, Lewis Hicks, III and Bernice Hicks respectfully pray that a writ of certiorari issue to review the February 28, 1994 judgment and opinion of the Appeals Court for the Commonwealth of Massachusetts, and the April 26, 1994 denial of their Petition for Further Appellate Review to the Supreme Judicial Court of the Commonwealth of Massachusetts.

OPINIONS BELOW

The Notice of Denial of Further Appellate Review Application issued by the Supreme Judicial Court for the Commonwealth of Massachusetts on April 26, 1994 is reprinted in the Appendix hereto, at App. 8, infra.

The Memorandum and Order of the Appeals Court for the Commonwealth of Massachusetts dated February 28, 1994 is reprinted in the Appendix hereto, at App. 1, infra.

The Memorandum of Decision and Order on Defendant's Motion to Dismiss (dismissing three out of four counts of the Petitioners' Complaint) of the Superior Court of the Commonwealth of Massachusetts dated May 31, 1991 is reprinted in the Appendix hereto, at App. 20, infra.

The Memorandum of Decision and Order for Judgment on Cross Motions For Summary Judgment (dismissing Petitioner's remaining count) of the Superior Court of the Commonwealth of Massachusetts dated April 30, 1992 is reprinted in the Appendix hereto, at App. 9, infra.

Pleadings relating to Petitioner Nelsons' first pending administrative action, Docket SE No. 10-804 and 10-805 (Notice of Intent dated June 22, 1989, Order of Conditions of Chatham Conservation Commission on remand dated September 22, 1989, and Superseding Order of Conditions of the Department of Environmental Protection dated March 29, 1990) are reprinted in the Appendix hereto, at App. 25, 30 and 31, infra.

Pleadings relating to Petitioner Hicks' first administrative action, Docket SE 10-855 (Notice of Intent dated

February 5, 1990, Order of Conditions of the Chatham Conservation Commission dated April 2, 1990, and Superseding Order of Conditions of the Department of Environmental Protection dated November 20, 1990) are reprinted in the Appendix hereto, at App. 34, 44 and 45, infra.

Pleadings relating to Petitioner Nelsons' second pending administrative action, Docket SE-10 987 (Notice of Intent dated December 23, 1991, Order of Conditions of the Chatham Conservation Commission dated January 30, 1992, and Superseding Order of the Department of Environmental Protection dated October 20, 1992) are reprinted in the Appendix hereto, at App. 48, 52 and 55, infra.

Pleadings relating to Petitioner Hicks' second administrative action, Docket SE 10-1027 (Notice of Intent dated May 15, 1992, Order of Conditions of the Chatham Conservation Commission dated July 2, 1992, and Superseding Order of the Department of Environmental Protection dated November 9, 1992) are reprinted in the Appendix hereto, at App. 66, 70 and 72, infra.

Certification of Environmental Impact Reports for the Chatham area pursuant to Massachusetts General Laws, Chapter 30, sec. 61-62H and dated September 30, 1993 and June 30, 1994 are reprinted in the Appendix hereto, at App. 76 and 80, infra.

STATEMENT OF JURISDICTION

Petitioners seek review from the opinion and judgment of the Appeals Court for the Commonwealth of

Massachusetts dated February 28, 1994. Petitioners' subsequent Request for Further Appellate Review was denied by the Supreme Judicial Court for the Commonwealth of Massachusetts on April 26, 1994. The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation".

The Fourteenth Amendment of the United States Constitution provides that the government shall not take private property without "due process".

The Massachusetts Wetlands Protection Act, Massachusetts General Laws, Chapter 131, sec. 40 is set forth in the Appendix, at App. 83, infra.

Regulations (parts I and II) pursuant to the Wetlands Protection Act, 310 Code of Massachusetts Regulations, sec. 10.00 et seq. are set forth in pertinent part in the Appendix, at App. 97, infra.

The Massachusetts Environmental Protection Act, Massachusetts General Laws, Chapter 30, sec. 61-62H is set forth in the Appendix, at App. 125, infra.

Regulation 301 Code of Massachusetts Regulations, Section 11.16, pursuant to the Massachusetts Environmental Protection Act, is set forth in the Appendix, at App. 136, infra.

STATEMENT OF THE CASE

In the early 1960s, Petitioners purchased single family homes on land bordering Chatham Harbor, a body of water protected from the Atlantic ocean by a barrier beach.

In 1978, the Commonwealth of Massachusetts promulgated regulations pursuant to its Wetlands Protection Act, Massachusetts General Laws, Chapter 131, sec. 40. The wetland regulations (310 Code of Massachusetts Regulations, Section 10.00, et seq. hereater "CMR" at App. 97, infra).

In January of 1987, the Chatham barrier beach was breached by an Atlantic storm. The hole in the barrier beach exposed Petitioners' properties to direct attack by ocean waves. Several of Petitioners' neighbors lost their homes because the Commonwealth of Massachusetts denied them permission to build seawalls (Complaint, par. 16, App. 141, infra).

Starting in 1989, Petitioners sought permission to build seawalls to protect their homes (see pleadings relating to administrative actions, App. 25-75, infra). The Town of Chatham denied their requests on a finding that the Petitioners' homes are on coastal dune (wind- or water-driven sand). The wetland regulations presume

that seawalls on coastal dunes cause environmental damage (see page 12, infra).

Petitioner Nelson appealed to the Commonwealth's agency charged with administering the wetland regulations, the Department of Environmental Protection ("DEP"). DEP told Petitioners that they would have to complete a detailed environmental study for 2.5 miles of coast before they would be given an administrative hearing. (See for example DEP correspondence of May 27, 1992, App. 147, infra, referring to study criteria outlined in Certificate of the Secretary of Environmental Affairs on the Environmental Notification Form, App. 152 and 153, infra). Numerous neighbors of Petitioners were allowed to build seawalls without administrative hearing or environmental study. App. 172, infra.

In December of 1990, Petitioners filed an action in the Superior Court for the Commonwealth of Massachusetts seeking, inter alia, declaratory relief from the Commonwealth's environmental practices, a judgment that said practices are unconstitutional, and damages for property loss resulting from the Commonwealth's prohibition of flood relief. (Complaint, App. 139, infra).

In January of 1991, the Superior Court, Dolan, J., presiding, found that Petitioners were in danger of irreparable harm, but did not order injunctive relief (see excerpt of hearing transcript, App. 155, infra). Appeals Court and Supreme Judicial Court single justices also refused to grant injunctive relief.

On May 31, 1991, the Superior Court, Xifaras, J., presiding, relied on the doctrine of exhaustion of administrative remedies to dismiss all of Petitioners' counts except unconstitutional conduct. App. 23, infra.

By early 1990, Petitioners had lost one hundred and sixty feet of beach. (Hicks Notice of Intent dated February 5, 1990, App. 39, infra). By November of 1991 Petitioners' homes had flooded once and the home of Petitioner Nelson was twenty feet from the sea (Affidavit of Alfred Nelson, filed in support of motions for temporary relief, App. 156, infra). Petitioners brought new requests to build seawalls before the Commonwealth's environmental agencies (Nelson Notice of Intent dated December 23, 1991, No. SE-10 987, App. 48, infra and Hicks Notice of Intent dated May 15, 1992, No. SE-10 1027, App. 66, infra). These too were denied.

On April 30, 1992, the Superior Court, O'Neill, J., presiding, dismissed Petitioners' Complaint on a finding that the Commonwealth's regulations are "rationally related" to the purposes of the Commonwealth's Wetland Protection Act (App. 16, infra).

During oral argument held September 20, 1993, the Appeals Court (Brown, J. presiding) ordered DEP to rule on Petitioners' variance requests within thirty days.

In January of 1994, DEP scheduled "expedited" hearings on Petitioners' seawall requests. DEP submitted this schedule to the Appeals Court in posthearing filings (see attachment to DEP denials of variance request dated October 26, 1993, App. 158 and 160, infra).

On February 28, 1994 the Appeals Court, (Brown, J.), affirmed the dismissal on findings that Petitioners had failed to show that the Commonwealth's administrative process is futile or that its regulations are irrational. App. 5 and 6, infra.

In May of 1994 there was an administrative hearing on Petitioners' permit requests. No decision has been reached and a variance hearing has been postponed indefinitely. App. 162, infra.

REASONS FOR GRANTING THE WRIT

1. Petitioners are not required to exhaust unconstitutional administrative remedies.

2. Respondents' regulations insure the imminent destruction of Petitioners' properties, making them worthless and eligible for relief under *Lucas v. South Carolina Coastal Council.*

3. Respondents have taken Petitioners' property by physical invasion.

4. Respondents' regulations have made Petitioners' property worthless, do not balance the interests of the parties, bear no substantial relationship to a legitimate state purpose, and have harmed Petitioners out of all proportion to the ills the regulations seek to limit.

1. NO NEED TO EXHAUST UNCONSTITUTIONAL ADMINISTRATIVE REMEDIES

Exhaustion of administrative remedies is used to restrict access to courts in cases of minor incursions into property rights under regulations whose constitutionality is not in doubt. *MacDonald Sommer & Frates v. Yolo County*, 477 U.S. 340, 350, note 7, 106 S.Ct. 2567, 91 L.Ed. 285 (1986). *Agins v. City of Tiburon*, 477 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

Exhaustion doesn't apply where administrative procedures are inadequate. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195, 205-6 (Stevens, J., concurring), 105 S.Ct. 3108, 3121, 3126, 87 L.Ed.2d 126 (1985).

a. Substantial Rights Involved.

It is undisputed that Petitioners' properties were worth over $2,000,000 before flooding began and have been in imminent danger of destruction by flooding since 1989.

b. Extraordinary Delay.

Petitioners have been trying since 1989 to get seawall permits. Both their houses were flooded in 1991 and one house sustained $100,000 in damage (Affidavit of Alfred Nelson, App. 157, infra). Petitioners have had to spend $140,000 for temporary flood control (see Petitioners' appeal of Superseding Order, App. 62, infra). The houses are without protection from winter storms (Affidavit of

Walter F. Bohlen, Ph.D., filed in relation to motions for temporary relief, App. 165, infra) and could be destroyed at any time.

After five years and with the help of the courts, Petitioners have had a permit hearing. No decision has been reached and the question of a variance has been indefinitely postponed.

Twenty-nine persons in the one mile immediately north of Petitioners have received permits and built seawalls since 1989 (See Figure 4-13 to Chatham Phase I Environmental Impact Report, App. 172, infra). None have had to appeal.

The twenty-nine seawalls were built after informal local hearings under Respondents' regulations and without the Environmental Impact Report ("EIR") usually required by the Massachusetts Environmental Protection Act ("MEPA", G.L.c. 30, secs. 61-62H, App. 127, infra).

Petitioners were denied seawalls in the local hearing, appealed, and were told they must file an EIR describing every seawall proposed or in place for the entire 2.5 miles of flooded coast in order to get a hearing on their appeal. Petitioners own less than 400 feet of frontage.

Petitioners have suffered an expensive five year delay while their neighbors received permits on request.

There is no end in sight. Petitioners could lose their homes before there is a decision (Affidavit of Bohlen, App. 165, infra).

c. Remedies Unconstitutional.

Respondents' regulation assumes that erosion does not exist and that offshore sand returns to dunes and beaches (310 CMR 10.30(1) par. 2, 10.27(1) par. 3, App. 116 and 107, infra).

Dunes and beaches do not receive the flow of sand (id.) and do not absorb wave energy (310 CMR 10.27(1) par. 2, App. 107, infra) or maintain form and volume (310 CMR 10.28(1) par. 5, App. 113, infra) as described by Respondents.

Dunes and beaches erode. All of the sand from this erosion is lost in deepwater. (See Affidavit of Bohlen, App. 165, infra and Affidavit of Ole Secher Madsen, Sc.D., filed in relation to motions for temporary relief, App. 177, infra).

There is no "battle of the experts" on this issue and no room for reasonable dispute. All eroded sand is lost in deepwater forever. Dunes and beaches are temporary way points in this process. Respondents' own expert says 97% of Massachusetts' beaches are eroding (excerpt of Affidavit of Benno Brenninkmeyer, filed in relation to the Commonwealth's motion for summary judgment, App. 181, infra).

Respondents claim that ongoing coastal erosion is storm damage prevention and flood control because it

supplies sand to dunes and beaches (supra, 310 CMR 10.27(1) par. 4, App. 108, infra).

Respondents ban seawalls because they stop erosion. (Seawalls affect "the ability of waves to remove sand from the dune" and interfere "with the landward or lateral movement of the dune" [310 CMR 10.28(3)(a) and (d), App. 115, infra].)

Yet seawalls in place before the regulation (1978), new seawalls to protect harbors (310 CMR 10.26, App. 104, infra), new seawalls for many pre-1978 buildings (310 CMR 10.30(3), App. 118 and 119, infra) and seawalls for selected emergencies (310 CMR 10.06, App. 102, infra) are allowed.

Respondents are unable to estimate how many seawalls they have licensed or will license under these exceptions or the amount of sand that these seawalls will deny to dunes and beaches.

Respondents allowed twenty-nine seawalls immediately to Petitioners' north (supra; App. 172, infra).

One of these seawalls protects a private tennis court adjacent to Petitioner Nelson (See excerpts of regulatory paperwork for the Chatham Beach and Tennis Club, No. SE-10 919, App. 182, infra).

According to Respondents, these seawalls deny sand to the dunes and beaches that protect Petitioners (310 CMR 10.30(1) par. 2, App. 116, infra).

Respondents have never explained why these seawalls were permitted and have forbidden inquiry into their impact on Petitioners.

Petitioners, on the other hand, cannot have seawalls until they have shown that their seawalls would benefit others (310 CMR 10.03(1), 10.28(3), and 10.36(2) at App. 101, 114 and 121, infra) and that the sand behind them clearly (310 CMR 10.28(1) par. 6, App. 113, infra) will not "play a role" (310 CMR 10.04 definition of "significant", at App. 102, infra) in the interests identified in the Wetlands Protection Act.

These interests include storm damage prevention, flood control, protection of shellfish beds, water supplies, ground water, wildlife habitat and marine fisheries, and prevention of pollution (310 CMR 10.01(2), at App. 100 and 101, infra).

A clear showing that seawalls play no role in these interests is impossible. "Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference". Restatement (Second) of Torts, sec. 822, Comment g, p. 112 (1979) (App. 190, infra), quoted in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 2898, 120 L.Ed.2d 798 (1992).

The burdens the regulations place on Petitioners violate this Court's takings jurisprudence in *Lucas*, 112 S.Ct. at 2899, and *Dolan v. City of Tigard*, No. 93-518, ___ U.S. ___, ___ S.Ct. ___, 1994 WestLaw 876693, p. 6-9 (1994). Petitioners are entitled to seawalls unless Respondents prove otherwise. It is Respondents' burden to demonstrate that Petitioners' seawalls would cause specific demonstrable harm.

Respondents have illegally manipulated regulatory requirements to frustrate Petitioners' appeals. They changed content requirements of the "Environmental Impact Report" ("EIR", supra) specifically (see Section 6.1 Introduction to Phase I Environmental Report, App. 173 and 175, infra) and illegally (see Massachusetts General Laws, Chapter 30, sec. 62B, par. 2, App. 129, infra and 301 CMR 11.16, App. 138, infra) to forbid discussion of the environmental impact of the twenty-nine seawalls to Petitioners' north.

The impact of the twenty-nine seawalls is critical to Petitioners' appeal. If the seawalls cause erosion, Petitioners need their own seawalls for protection. If not, then Petitioners' seawalls will not cause erosion either.

The EIR for Petitioners' area had to describe the impact of every single seawall proposed or built. When it found that a single wall for the area would not cause damage, Respondents ordered a re-examination of the finding on a case by case basis (Certificate of the Secretary of Environmental Affairs on the Final Environmental Impact Report [Phase II of Chatham EIR study], App. 81, infra).

Respondents' regulation is a perpetual erosion scheme intended to return the coast to a state of nature by destroying development. (See "Saving the American Beach: A Position Paper by Concerned Coastal Geologists", signed by Respondents' experts Dr. Orin H. Pilkey, Jr., Dr. Benno Brenninkmeyer, and Jeff Benoit, filed by Petitioners in relation to motions for summary judgment, excerpted at App. 187, infra.)

The coast is the cradle of wetlands. Coastal erosion is wetlands destruction.

Seawalls on the other hand, can protect all coastal interests, including wetlands.

Respondents have embarked on a campaign of coastal destruction without regard for wetlands protection or human rights.

Respondents' remedies are part of this scheme. They are intended to exhaust the financial resources of those who resist.

The argument that Respondents may eventually act favorably on the appeal is not persuasive where a reasonable time to make the decision has passed and ongoing delay means added expense and the risk of complete destruction of the properties.

The record shows that Respondents agencies are not the "singularly flexible institutions" this Court has assumed them to be in the past. *MacDonald,* 47 U.S. at 350, 106 S.Ct. 2567.

A fanciful administrative remedy cannot be allowed to bar enforcement of fundamental constitutional rights.

2. ADMINISTRATIVE REMEDIES VIOLATE LUCAS

Petitioners have been subjected to a different and unconstitutional standard of proof, have been denied critical information and forced to expend substantial sums to defend their property while waiting for Respondents to decide this case.

The only value that remains in Petitioners' properties is the hope that they might some day receive a seawall permit.

At $240,000 (supra), the cost of delay already exceeds this value with no end in sight.

Petitioners' properties are worthless.

Regulations that deny a common land use and deprive land of all economic value require compensation unless the state shows that the intended use would violate principles of common law. The state must act as if seeking "to restrain [Petitioners] in a common-law action for public nuisance". *Lucas*, 112 S.Ct. at 2901.

Petitioners have been denied all meaningful administrative relief. *Williamson*, 473 U.S. at 194-5, 105 S.Ct. at 3121. See also Massachusetts General Laws, Chapter 231A, secs. 2 and 3 (App. 193, infra); *St. Luke's Hospital v. Labor Relations Commission*, 70 N.E.2d 10, 12 (Mass. 1946); *Wilson v. Commonwealth*, 597 N.E.2d 43, 46, footnote 6 (Mass. 1992) (unreasonable agency delay can be brought to Superior Court without exhausting administrative remedies).

3. PHYSICAL INVASION

Government action that leads to the physical invasion of private property is per se compensable under the Fifth Amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427, 102 S.Ct. 3164, 3171, 73 L.Ed.2d 868 (1982); *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-2, 107 S.Ct. 3141, 3146, 97 L.Ed.2d 677 (1987); *Lucas*, 112 S.Ct. at 2893.

Exhaustion of remedies doesn't apply to government invasion of private property. Suit can be brought on the date of the intrusion. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 2191, 81 L.Ed.2d 1 (1984).

The reasons for government action and the degree of the owners' loss is irrelevant. Compensation is automatic. *Loretto*, 458 U.S. 432, 102 S.Ct. 3174.

The government need not take possession. Here Respondents' seawall denials caused Petitioners' property to be invaded by water. *Pumpelly v. Green Bay Co.*, 13 Wall [80 U.S.] 166, 181, 20 L.Ed. 557 (1887); *U.S. v. Lynah*, 188 U.S. 445, 468-470, 23 S.Ct. 349, 356-357, 47 L.Ed. 539 (1903).

Respondents deny Petitioners seawalls on the theory that sand eroded from Petitioners' unprotected lots provides flood protection to neighboring coastal lots (supra). This is a physical invasion that infringes on private property rights and requires compensation. *Loretto*, id; *Nollan*, 483 U.S. at 831-2, 107 S.Ct. at 3145-6; *Dolan*, 1994 WestLaw 876693 at 5.

4. BALANCING PUBLIC AND PRIVATE INTERESTS

Government action that forces private property owners to bear the entire burden of a public benefit is a taking. The Fifth Amendment requires that serious loss be shared even when substantially related to legitimate state purpose. *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); *Agins*, 477 U.S. at 260, 100 S.Ct. at 2141.

To determine when compensation is required, courts must make "ad hoc, factual inquiries" balancing the character of the government's action and the impact on the owner's investment-backed expectations. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978).

Courts first determine whether regulations which diminish property value "significantly advance" legislative purpose. *Agins v. City of Tiburon*, 477 U.S. at 260, 100 S.Ct. at 2141; *Nollan*, 483 U.S. at 834, note 3, 841, 107 S.Ct. at 3147, note 3, 3150-1.

If this nexus is found, courts then determine whether the regulation is properly tailored to control the harm likely to result from the Petitioners' intended land use. *Dolan*, 1994 WestLaw 876693 at 6-9.

Regulations which restrict land use beyond that needed to control the harm, and regulations which have nothing to do with the intended land use are unconstitutional. The state has the burden of proving the legitimacy of its actions. *Dolan*, 1994 WestLaw 876693 at 9.

Courts below did not follow the Nollan/Dolan tests. They found that there was a "rational basis" for the regulations. This is a test traditionally applied to Fourteenth Amendment cases and cases concerning minor infringements of property rights presenting no specific harm. *Dolan*, 1994 WestLaw 876693 at 13, footnote 8; *Nollan*, 483 U.S. at 834, footnote 3, 107 S.Ct. at 3147 (standard of review is determined by the nature of the right infringed). It fails to balance the likely benefits of the regulation against the certain loss of Petitioners' houses.

Application of the rational basis test to takings leads to "the abdication of meaningful judicial review" of administrative action. *Worcester Sand and Gravel v. Fire Prevention Board*, 510 N.E.2d 267, 272 (Lynch, J., dissent) (Mass. 1985).

Under this test, any tenuous connection between legislative purpose and the regulation is sufficient. This Court has rejected this standard of review as it "improperly relegates the Fifth Amendment to the status of a poor relation". *Dolan*, 1994 WestLaw 876693 at 9.

Respondents' regulations are not substantially related to legislative purpose (see discussion of science relating to the regulations, supra). There is no proportionality between the effect of the regulatory restriction (destruction of Petitioners' homes) and the negligible effect that Petitioners' seawalls might have on neighboring properties.

Respondents deny coastal homeowners the right to protect themselves on the unproven assertion that seawalls do more harm than good (supra).

Respondents do not explain how erosion might protect other interests described in the Wetlands Protection Act such as wildlife habitat, public and private water supplies, ground water, or shellfish beds (310 CMR 10.01(2), App. 100 and 101, infra).

Respondents do not explain how erosion protects wetlands and tacitly reject the concept by selectively allowing seawalls.

Respondents believe that as a practical matter erosion exists only where people build too near the ocean.

Their solution is to destroy coastal properties. (See "Saving the American Beach", excerpted at App. 188, infra.) They substitute a blind reliance on nature for a reasoned assessment of risks and benefits on the coast.

Respondents' practices and procedures have no substantial relation to legitimate state purposes. *Agins*, 477 U.S. 260, 100 S.Ct. at 2141; *Nollan*, 483 U.S. at 834, 107 S.Ct. at 3147. The destruction of Petitioners' property resulting from the application of Respondents' regulations is out of all proportion to any environmental damage that Petitioners' seawalls might cause. *Dolan*, 1994 WestLaw 876693 at 9.

5. STANDING

The trial court dismissed counts challenging the constitutionality of the regulations and seeking injunctive relief and damages on the grounds that administrative remedies were available.

The court heard the issue of Respondents' unconstitutional conduct (Complaint, Count II, App. 143, infra) on motion for summary judgment and found against Petitioners saying that Respondents' regulations are "rationally related" to statutory purpose (supra).

After the appeal was taken and before it was heard, the *Lucas* case was decided. Petitioners argued that *Lucas* applied to all counts in the Complaint in their appellate brief.

"Where the state court has considered and decided the constitutional claim, [the Supreme Court] need not consider how or when the question was raised". *First*

English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 313, note 5, 107 S.Ct. 2378, 2385, 96 L.Ed.2d 250 (1987).

CONCLUSION

Respondents intend to destroy Petitioners' properties without compensation.

The properties have lost all economic value because they require expensive flood protection during pursuit of meaningless administrative remedies.

There is no legitimate state purpose in Respondents' regulations. Respondents seek to return the coast to a state of nature on the premise that this will protect wetlands.

Respondents have made no showing that this policy ever works, or that it might work on Petitioners' properties. They have failed to compensate those damaged by it.

Petitioners ask that this case be returned to the Massachusetts Appeals Court with a finding that Petitioners are entitled to pursue injunctive relief and damages.

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

92-P-827

ALFRED NELSON & Others[1]

vs.

COMMONWEALTH; TOWN OF CHATHAM, intervener.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

We affirm the Superior Court's (a) dismissal of count IV of the plaintiffs' complaint (regulatory taking); (b) allowance of summary judgment in favor of the Commonwealth against count II of the complaint (unconstitutionality of wetlands regulations); and (c) declaration of the challenged regulations' constitutionality. Our rulings rest essentially upon the reasons set forth in the May 31, 1991, memorandum and decision and order of the first Superior Court judge and the April 30, 1992, memorandum and order of the second Superior Court judge, as amplified in the thoughtful and balanced appellee's brief of the Commonwealth.[2]

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[1] Evelyn Nelson, Lewis Hicks, III, and Bernice Hicks.

[2] No record references were provided for the vast majority of the factual statements in the plaintiffs' brief. Given the prodigious size of the appendix that the plaintiffs presented to this court, their noncompliance with the mandate of Mass.R.A.P. 16(e), 365 Mass. 862 (1974) & 378 Mass. 940 (1979), not only caused the court substantial inconvenience and unnecessary expenditure of time in determining whether such statements were supported by the record, but also would have justified our striking their entire brief, Mass.R.A.P. 16(k), 365 Mass. 863 (1974), or disregarding virtually all of its contents. See *Service*

As to count IV, the plaintiffs, who still reside in their seaside homes, cannot plausibly assert that they have been denied all economically viable use of their property.[3] Even if they could, however, they have failed to demonstrate that any of the limited exceptions to the long-standing general rule, that administrative remedies must be exhausted before resort may be had to the courts,

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Publications, Inc. v. Goverman, 396 Mass. 567, 580 (1986); *Boston Edison Co. v. Brookline Realty & Inv. Corp.*, 10 Mass. App. Ct. 63, 69 (1980).

[3] A land-use regulation does not effect a taking unless it "denies an owner economically viable use of his land." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985), quoting from *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). *Wilson v. Commonwealth*, 31 Mass. App. Ct. 757, 764-765, *S.C.*, 413 Mass. 352 (1992). It defies logic for the plaintiffs to allege, at this stage, that the Department of Environmental Protection's refusal to allow them to build seawalls amounts to a regulatory taking. "A requirement that a person follow administrative procedures for obtaining a permit is not a taking of property." *Wilson v. Commonwealth*, 413 Mass. at 356-357. Moreover, it is clear that the plaintiffs have not lost all economically viable use of their property. The actual use to which the plaintiffs put their properties has not at all been affected by the denial of their requests. Both homes remain intact, and it is far from a foregone conclusion that the Department will ultimately prohibit protective measures or that the homes will be claimed by the sea. See *id.* at 356 n.4 (plaintiffs could prevail on taking claim, that the Department would have unlawfully denied permission to construct a seawall, only by demonstrating that the Department, after all appeals periods had elapsed, would have unjustifiably denied the request and the denial "would have caused a total loss of the value of the plaintiffs' properties"). Contrast *Wilson v. Commonwealth*, 31 Mass. App. Ct. at 764-767 (dismissal of regulatory taking claim on Mass.R.Civ.P. 12[c] premature where homes had been overrun by the ocean; trial necessary to elicit facts to enable trial judge to make a determination on taking issue).

are applicable to the circumstances of their case. Merely because a constitutional issue is alleged to be involved in their regulatory taking claim does not obviate the exhaustion requirement. See *Wilson v. Commonwealth*, 31 Mass. App. Ct. 757, 765 *S.C.*, 413 Mass. 352, 356 (1992);[4] *Williamson County Regional Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

There has been no showing that following the administrative process to its conclusion would be futile, in the requisite sense that administrative relief is "virtually

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[4] We mention, in passing, our doubt that a taking analysis is even applicable to the plaintiffs' situations. "Throughout history, the shores of the sea have been recognized as a special form of property . . . subject to different legal rules from those which apply to inland property." *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629, 631 (1979). All titles to oceanfront property derive from the Commonwealth and remain subject to the public trust with which all such property was impressed when held by the Commonwealth through the English Crown, resulting in private owners of shorefront land holding only a qualified property interest that does not extend to interfering with or obstructing the public's rights of navigation, fishing, or other maritime activities and that may not support a taking claim. *Id.* at 632-637, 649; *Wilson v. Commonwealth*, 31 Mass. App. Ct. at 768. See also *National Audubon Soc. v. Superior Court*, 33 Cal. 3d 419, cert. denied, 464 U.S. 977 (1983), and *Orion Corp. v. State*, 109 Wash. 2d 621 (1987), cert. denied, 486 U.S. 1022 (1988) (both standing for the proposition that, to the extent challenged regulations prohibit uses or activities that would violate the public trust which it is the State's duty to protect and enforce, they are insulated from a taking challenge; since shorefront land has been held in public trust or subject to the public trust from the outset, there could not subsequently have been reasonable, investment-backed expectations in, and nothing is taken by prohibiting or regulating, activities violative of or impinging upon the interests protected by the public trust).

impossible" to obtain, *Stock v. Massachusetts Hosp. Sch.*, 392 Mass. 205, 213 (1984), cert. denied, 474 U.S. 844 (1985), for whatever reason, or that there is no chance of success at the administrative level because an adverse outcome is a foregone conclusion. See *Massachusetts Respiratory Hosp. v. Department of Pub. Welfare*, 414 Mass. 330, 337 (1993). See also *Gilbert v. Cambridge*, 932 F.2d 51, 61 (1st Cir.), cert. denied, 112 S.Ct. 192 (1991).[5]

The plaintiffs' affidavits submitted in opposition to the motion to dismiss suggest, at most, considerable delay in the Department's holding of adjudicatory hearings on their appeals. Mere delay, however, does not amount to futility of the sort justifying bypassing the normal administrative processes, particularly when the plaintiffs have presented nothing to suggest the impossibility of ultimately obtaining from the Department permission to build their desired structures as authorized by 310 Code Mass. Regs. §§ 10.28(2) & (3) and 10.30 (1989).[6]

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[5] The plaintiffs gain nothing by invoking G. L. c. 231A, § 2, which authorizes declaratory judgment actions as to administrative practices and procedures alleged to be unconstitutional. The Declaratory Judgment Act has codified the futility exception to the exhaustion requirement. G. L. c. 231A, § 3. In any event, application of the exhaustion requirement in a declaratory judgment action is within the discretion of the trial judge, *I.S.K. Con of New England, Inc. v. Boston*, 19 Mass. App. Ct. 327, 330 (1985), which the plaintiffs have failed to show was abused in any respect in this litigation. See *Mazzoleni v. Cotton*, 33 Mass. App. Ct. 147, 152-153 (1992).

[6] To the extent the judge considered the plaintiffs' affidavits on the motion to dismiss, he would have been entitled in his discretion to disregard them, particularly since the only one (that of Robert E. Weaver) that asserted the Department's

Finally, the plaintiffs have not, beyond conclusory assertion, demonstrated that continued delay in the Department's adjudicatory process will cause them to suffer irreparable harm before the process can run its course (a situation which, if true, might well justify excusing them from further pursuit of the administrative remedy, see *Everett v. Local 1656, Intl. Assn. of Firefighters*, 411 Mass. 361, 368 [1991]). The Nelsons have obtained from the Department an emergency certification (A. 1410-1415) allowing them to install a temporary sand bag revetment to protect their property pending final administrative action on their proposal to build a seawall – an interim solution that the Nelsons do not allege, let alone prove, is or has been ineffective for its purpose.[7] Moreover, the plaintiffs have been unable to persuade either the Superior Court, an Appeals Court single justice, or a Supreme Judicial Court single justice that they are in danger of suffering irreparable harm (A. 1, 2, 216, 217). They have produced nothing before this court, except conjecture, that suggests those tribunals were wrong in finding no likelihood of irreparable harm pending the outcome of the normal administrative process.[8]

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alleged policy against ever allowing property owners in the position of the plaintiffs the relief they sought was unexecuted, was hearsay, and was self-contradictory, since the affiant acknowledged that the Department had in fact allowed more than fifty similarly situated property owners the same relief (A. 341).

[7] For reasons not apparent in the record, the Hickses never sought such emergency relief.

[8] Posthearing filings indicate that the administrative process is nearing completion, with the issuance of a draft environmental impact report, as required by 310 Code Mass. Regs.

As to the summary judgment dismissing the plaintiffs' claim (count II) that the regulations violate the due process and equal protection guaranties, by forbidding the exercise of an unimpeded right to erect a seawall, the plaintiffs have fallen woefully short of meeting their formidable burden on appeal. They have utterly failed to establish the absence of any conceivable ground on which the regulations can be upheld or the lack of any rational relationship between the regulations and a permissible legislative objective. See *Pinnick v. Cleary*, 360 Mass. 1, 14 (1971); *Worcester Sand & Gravel Co. v. Board of Fire Prevention Regulations*, 400 Mass. 464, 467 (1987); *Gilbert v. Cambridge*, 932 F.2d at 65. The Commonwealth submitted substantial affidavit testimony from experts demonstrating that the regulations inhibiting seawall construction on coastal dunes (the areas on which the plaintiffs' properties sit) facilitate flood control and mitigate storm damage – both express statutory purposes, see G. L. c. 131, §§ 40, 40A; cf.

G. L. c. 91, §§ 2, 10, 14, 15, 17, 23 – and that coastal dunes require more restrictive regulation than do coastal banks in order to attain the same goals.

Under the authorities, the plaintiffs could not establish a constitutional violation merely by showing, as they purported to do, that there existed a difference of opinion in the scientific community regarding the effect of seawalls on the beach environment and that there might be a possibly more reasonable way to distinguish between

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§ 10.07 (1989), and the Department's setting of an expedited schedule for holding adjudicatory hearings on the plaintiffs' applications.

banks and dunes or regulate construction thereon. See *Mobil Oil Corp. v. Attorney Gen.*, 361 Mass. 401, 417 (1972); *Zeller v. Cantu*, 395 Mass. 76, 85 (1985); *Arthur D. Little, Inc. v. Commissioner of Health & Hosps. of Cambridge*, 395 Mass. 535, 553 (1985). There was nothing irrational, arbitrary, or invidious about the Department's conscientiously crafted and scientifically based effort to solve problems caused by unregulated construction on coastal dunes and banks.

Judgment affirmed, with double costs of appeal.[9]

By the Court (Brown, Fine, & Laurence, JJ.),
/s/ Warren L. Shields
Asst. Clerk

Entered: February 28, 1994.

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[9] See note 2, *supra*.

Supreme Judicial Court for
the Commonwealth of Massachusetts
1412 Courthouse,
Boston, Massachusetts 02108
(617) 557-1020

Nicholas B. Soutter, Esquire
1 Washington Street, Suite 208
Suite 208
Wellesley MA 02108

RE: Docket No. FAR-07153

ALFRED NELSON & others
vs.
COMMONWEALTH; TOWN OF CHATHAM, intervener

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on April 26, 1994, the above captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: April 26, 1994

To: Nicholas B. Soutter, Esquire
Madelyn Morris, Esquire
Bruce P. Gilmore, Town Counsel

Commonwealth of Massachusetts

BARNSTABLE, ss. SUPERIOR COURT

No. 90-1712

ALFRED NELSON & others[1]

VS.

COMMONWEALTH OF MASSACHUSETTS and another[2]

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The plaintiffs' complaint seeks recovery against the defendants due to the enforcement of environmental regulations which prohibit the plaintiffs from erecting stone seawalls, or revetments, on their property. Without the erection of these person-made structures, allege the plaintiffs, the natural erosion of the coastal beach and coastal dunes abutting their property will cause tremendous damage to the residences affixed to their coastal real property. The plaintiffs' homes, in short, are slipping into the sea. The court, by a prior Order, dismissed plaintiffs' claims for relief based upon the theories of negligence and regulatory taking because of the plaintiffs' failure to exhaust their administrative remedies. See *Nelson v. Commonwealth*, Civil No. 901712, Memorandum of Decision and Order on Defendant's Motion to Dismiss (Barnstable

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[1] Evelyn Nelson, Lewis Hicks, III, and Bernice Hicks.

[2] Town of Chatham.

Super. Ct., May 31, 1991) (per Xifaras, J., a copy of which is attached as Appendix A).

The defendant, Commonwealth of Massachusetts (Commonwealth), has moved for summary judgment on the plaintiffs' remaining claims, constitutional challenges to the relevant regulations on the basis of substantive due process and equal protection.[3] Following a hearing and plethoric briefing, the court allows the Commonwealth's motion for summary judgment.

FACTS

The relevant material facts to this dispute have already been adequately explicated by the court, see Appendix A, and therefore the court, now, shall only briefly recap the events. In January, 1987, a winter storm washed away a section of a sandy barrier off the coast of Chatham, Massachusetts. The resulting breach, in an area commonly known as Nauset Beach, has spelled catastrophe for certain owners of coastal property in Chatham harbor. The breach is causing natural erosion of the coastline which, in turn, threatens the very existence of the residences affixed to the beachfront properties. See generally *Wilson v. Commonwealth*, 31 Mass. App. Ct. 757, 758-759, further app. rev. granted 412 Mass. 1102 (1992). The plaintiffs sought permission through both the

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[3] The defendant, town of Chatham, does not join in the Commonwealth's motion, although given the court's disposition of these claims, the doctrine of the law of the case would not prohibit the court from subsequently allowing appropriate relief. See *Chase Precast Corp. v. John J. Paonessa Co.*, 409 Mass. 371, 379 (1991).

Chatham Conservation Commission ("Commission") and the Massachusetts Department of Environmental Protection ("Department") to build stone seawalls, or revetments, as an artificial means of preventing further erosion of their property.[4] These requests were denied. The basis for the denial was a finding that the proposed structures would aggravate flooding and impose storm damage on adjacent properties.

The Wetlands Protection Act, G.L. c. 131, § 40 (1990 ed.), protects "coastal dunes" and "coastal banks" and presumes both to be "significant to storm damage and flood control." See 310 Code Mass. Regs. §§ 10.28, 10.28(1), 10.30, 10.30(1) (1987).

A coastal dune is a "natural hill, mound, or ridge of sediment, landward of a coastal bank deposited by wind action or storm overwash." 310 Code Mass. Regs. § 10.28(2). Coastal dunes serve as flood controlling devices by serving as a permeable barrier to the ocean's waves: absorbing wave energy and causing waves naturally to turbulate through and around the dune and thereby protecting upland property. Coastal dunes also

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[4] The plaintiffs' memorandum entreats the court to recognize that artificial retaining walls have been used to protect coastal property for over two thousand (2000) years. The plaintiffs do not, apparently, seek this court to take judicial notice of these allegedly historical facts. The court mentions this merely to note, in passing, that the questionable wisdom of affixing a residential structure to coastal real property has been recognized for a comparable period of time. See Matthew 7:26-27 (" . . . like a foolish man who built his house upon the sand; and the rain fell, and the floods came, and the winds blew and beat against that house, and it fell; and great was the fall of it.")

provide sediment naturally to eroding coastal beaches, the latter which also dissipate wave energy. See *id.*

A coastal bank is the "seaward face or side of any elevated landform other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action or other wetland." 310 Code Mass. Regs. § 10.30(2). Coastal banks serve as a major source of sediment for coastal beaches and dunes and, to a much lesser extent than coastal dunes, act as a buffer for flooding to upland areas by dissipating waves. See *id.*

The regulations directly at issue here prohibit any "dredging, filling, removing[,] or alteration" of coastal banks or coastal dunes if such action interferes with the above-stated flood control functions. See 310 Code Mass. Regs. §§ 10.28(1), 10.30(1). "The regulations draws a key distinction between the two forms of wetlands. While the prohibition against building coastal dune revetments is absolute, see 310 Code Mass. Regs. § 10.28(4), it does not apply to coastal banks, which are exempted because of their height and stability. Revetments may be raised on this type of land if they are built to protect buildings constructed prior to August 19, 1978, if they are absolutely necessary, and if they minimize any adverse environmental impact. 310 Code Mass. Regs. § 10.30(3)." *Wilson v. Commonwealth, supra* at 760.

The Department determined that the plaintiffs' proposed revetments were to be built on coastal dunes, subject to the absolute prohibition, and therefore denied the plaintiffs' proposed project. The plaintiffs challenge the constitutionality of the regulations, 310 Code Mass. Regs.

§§ 10.28, 10.30, on the basis of the due process clause and the equal protection clause.

DISCUSSION

"Summary judgment is a 'device' to make possible the prompt disposition of controversies on the merits without a trial, if in essence, there is no real dispute as to the salient facts or if only a question of law is involved." *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983), quoting *Community National Bank v. Dawes*, 369 Mass. 550, 553 (1976). Rule 56(c) of the Massachusetts Rules of Civil Procedure provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989) (citations omitted).

The court must not grant summary judgment merely because the facts which the moving party offer appear more plausible than those which the opposing party offers or because it appears that the opposing party is not likely to prevail at trial. *Attorney General v. Bailey*, 386 Mass. 367 (1982). The moving party must affirmatively show that there is no genuine issue of fact on any material issue raised by the pleadings and that the moving party is entitled to judgment as a matter of law. *Pederson*, 404 Mass. at 17. In the case of a defendant moving for summary judgment, this affirmative showing need not

consist of "affirmative evidence negating an essential element of the plaintiff's case, but may be satisfied by demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

The plaintiffs entreat the court to apply a standard of reviewing the regulations that requires they "substantially advance [a] legitimate state interest . . . ", *Wilson v. Commonwealth*, 31 Mass. App. 757, 764 (1992), quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). This is the standard to show a regulatory taking of private property for public use without just compensation, in contravention of the fifth and fourteenth amendments to the United States Constitution. *Wilson, supra* at 764-765. That constitutional claim was previously dismissed by this court, per Xifaras, J. See *Nelson v. Commonwealth*, Civil No. 90-1712. (Barnstable Super. Ct., Memorandum of Decision and Order on Defendant's Motion to Dismiss, May 31, 1991). The court, in dismissing various aspects of what might be described as the plaintiffs' "confused complaint", see *Wilson, supra* at 758 & n.2, specifically held that the plaintiffs had failed to demonstrate futility in failing to exhaust the administrative remedies available to them. *Nelson, supra* at 4.

Therefore, the constitutional claims which have survived the motion to dismiss are the plaintiff's equal protection and due process attacks on the regulations. Under this standard of review, the plaintiff bears the burden of demonstrating to this court the absence of a rational relationship between the adopted measure and its objective. *Wilson, supra* at 764 n.12. See *Nollan v. California*

Coastal Comm'n., 483 U.S. 825, 834 n.3 (1987). The plaintiffs have the "formidable burden of proving the absence of any conceivable ground upon which the regulation can be upheld." *Worcester Sand & Gravel Co. v. Board of Fire Prevention Regulations*, 400 Mass. 464, 467 (1987); see also *Arthur D. Little, Inc. v. Commissioner of Health & Hosps. of Cambridge*, 395 Mass. 535, 553 (1985). But see *Worcester Sand & Gravel Co., supra* at 472 (Lynch, J. dissenting); *Arthur D. Little, Inc., supra* at 557-567 (same).

Even if the rationality of the statute is "fairly debatable", this court cannot substitute its judgment for that of the Department. *Worcester Sand & Gravel Co., Inc., supra* at 467. "This deference is necessary to maintain the separation between the powers of the Legislature and administrative agencies and the powers of the judiciary". *Borden, Inc. v. Commissioner of Public Health*, 388 Mass. 707, 723 (1983). Properly promulgated regulations have the force of law. *Id.* As compared to the courts, administrative agencies " 'may be relatively the experts on many problems of discretion or policy within the areas of their specialization.' " *Arthur D. Little. Inc., supra* at 554, quoting 5 K.C. Davis, Administrative Law, § 29:3, at 343-344 (2d ed. 1984).

The plaintiffs attack the rationality of the regulations by claiming that the natural beach erosion theory is a fallacy. The plaintiffs claim that, by preventing them from building seawalls, or revetments, the Department is actually in violation of the Wetlands Protection Act's policy of preventing flood and storm damage. The department counters with evidence which suggests that the erection off revetments may cause more harm than good. According to the Department, the placement of revetments to

protect coastal dune erosion merely causes wave action to erode contiguous coastal beach, coastal bank, and coastal dune formations downdrift of the person-made artificial structures. Moreover, the Department contends, revetments themselves may become subject to wave action and erosion at the very corners of the artificial structures.[5] When this occurs, the revetment requires either additional reinforcement – causing still greater environmental impact, or the seawall itself may become dislodged, thereby exacerbating the situation it was intended to remedy.

The court's examination of the record[6] indicates that the issue of the rationality of the regulation is, at the very least, debatable and the court, therefore, is bound to refuse to substitute its judgment for that of the Department. See *Worcester Sand & Gravel Co., supra* at 467. This point is illustrated by the plaintiffs' own submissions, see

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[5] The Department's experts refer to this as "scour".

[6] In passing upon a motion for summary judgment, the court recognizes "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" in determining the undisputed material facts. Mass. R. Civ. P. 56(c). The plaintiffs, in support of their motion for summary judgment, submitted a three hundred and sixty-five (365) page bound "Appendix" which included seventy eight (78) "Exhibits". Most of these exhibits were not incorporated by reference into any form of accompanying affidavit, although some are in proper form. This is woefully inadequate. The Department, however, did not move to strike any parts of the plaintiffs' "Appendix". See *Brunson v. Wall*, 405 Mass. 446, 448 n.4 (1989). Given the relative importance of a determination of the constitutionality of these regulations, the court has examined the plaintiffs' "Appendix" in its entirety, even though it need not have.

supra n.5, which indicate that a debate currently exists in the scientific community as to the way stone seawalls and revetments impact the storm and flood control potential of the natural erosion process by which coastal dunes and coastal banks nourish coastal beaches naturally with sediment. O. Pilkey & H. Wright, Seawalls versus Beaches, Journal of Coastal Research, Special Issue No.4 41, 43 (1988) ("lively disagreement over the active role of seawalls in beach alteration still exists and has become the focus of the 'Great Seawall Debate' . . . there is wide acceptance of the concept of active wall participation in beach degradation."); G. Griggs, J. Tait, K. Scott & N. Plant, The Interaction of Seawalls and Beaches, Coastal Sediments 1871, 1872-1873 (1991) ("[o]ne of the principal complaints of the decisionmaking community is they not only are are [sic] being told one thing by some scientists and something else by others, but they are frequently being told different things at different times by the same scientists.")

Given the general lack of consensus in the scientific community, the court must conclude that the regulations at issue are rationally related to the statutory purposes of the Wetlands Protection Act of storm damage prevention and coastal flood control. Therefore, the plaintiffs' due process claim fails.

Moreover, an administrative agency, in exerting delegated legislative authority in a proper area, may proceed " 'one step at a time, addressing itself to the phase of the problem which seems most acute' " and therefore " 'it need not embrace every conceivable problem within that field' ". *Consolidated Cigar Corp. v. Department of Public Health*, 372 Mass. 844, 854 (1977), quoting *Mobile Oil Corp.*

v. Attorney Gen., 361 Mass. 401, 417 (1972). The court therefore concludes that the differing treatment of the erection of revetments in the "grandfathering" provision of the regulations which protects buildings constructed prior to August 19, 1978, based upon whether the coastal property is classified as a coastal bank or a coastal dune, is rationally based upon the differing effects on natural erosion by these two types of formations. See *Gilbert v. City of Cambridge*, 932 F.2d 51, 66 (1st Cir. 1991) ("absent a clear showing of arbitrariness or irrationality, an equal protection challenge to a state regulation or a municipal ordinance is doomed to failure.") Therefore, the plaintiffs' equal protection claim fails.[7]

ORDER

Based upon the foregoing, it is hereby ***ORDERED*** that:

1) the plaintiffs' motion for summary judgment be, and hereby is ***DENIED***;

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[7] Because the court finds the regulations at issue here to be constitutional, it need not address the Commonwealth's argument that money damages are unavailable to the plaintiff. Parenthetically, the court notes that the Commonwealth's statement that no Massachusetts court has implied from a constitutional provision a direct cause of action is not an accurate statement of the law. See *Layne v. Superintendent, Massachusetts Correctional Institution, Cedar Junction*, 406 Mass. 156, 160 (1989) ("certainly a State may not violate a person's constitutional rights and then fairly assert that no redress can be had because the State has not provided a statutory means of enforcing those rights.")

2) the defendant, Commonwealth of Massachusetts', motion for summary judgment be, and hereby is *GRANTED;* and

3) it is further *DECLARED* that the regulations, 310 Code Mass. Regs. §§ 10.28, 10.30 (1987) are valid and constitutional.

Judgment shall enter for the defendant, Commonwealth of Massachusetts.

/s/ Gerald F. O'Neill, Jr.
Gerald F. O'Neill, Jr.
Justice of the Superior Court

Dated: April 30, 1992

A true copy, Attest:

/s/ Phyllis A. Day
Clerk

APPENDIX "A"

Commonwealth of Massachusetts

BARNSTABLE, ss. SUPERIOR COURT
No. 90-1712

ALFRED NELSON and others[1]

vs.

COMMONWEALTH OF MASSACHUSETTS

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

Defendant in this land taking case moves to dismiss plaintiffs' complaint, pursuant to Mass. R. Civ. P. 12(b) (1) and (6) on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

BACKGROUND

Plaintiffs own shorefront properties located on a coastal dune in the town of Chatham. Since the area is subject to regulation under the Wetlands Protection Act, plaintiffs filed notices of intent with the Chatham Conservation Commission ("Commission") seeking permission to build an armored dune and stone seawall to protect their properties. After determining that the proposed project would aggravate flooding and impose storm damage on adjacent properties' the Commission issued orders of conditions denying its construction. The Commission

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[1] Evelyn Nelson, Lewis Hicks III, and Bernice Hicks.

suggested alternative means for plaintiffs to protect their properties.

Plaintiffs appealed the Commission's decision, requesting that the Department of Environmental Protection ("Department") issue superceding orders allowing the construction. The Department also denied the construction via superceding orders.

The Nelsons appealed the superceding orders, requesting that the Department hold an adjudicatory hearing. The Hicks did not appeal the superceding orders. Rather, they filed a second notice of intent with the Commission seeking permission to build an artificial dune consisting of sand-filled durabags. The Commission issued an order of conditions allowing this construction. The Department, however, informed the Hicks that it intends to issue an order superceding that of the Commission.

Plaintiffs then filed the instant complaint claiming that the application of the Wetlands Protection Act to their properties amounts to unconstitutional conduct, negligence, and a taking. They seek both money damages and injunctive relief.

In the instant motion, defendant argues, inter alia, that plaintiffs' complaint must be dismissed because they failed to exhaust administrative remedies before seeking judicial relief. Plaintiffs oppose, claiming that G.L. c. 231A, § 2, and G.L. c. 30A, § 7, provide jurisdiction and that exhaustion of remedies is not required where it would prove futile or where irreparable harm would result if judicial action were delayed by the implementation of the administrative process.

DISCUSSION

Whether this court has subject matter jurisdiction to hear plaintiffs' dispute is a question of law for the court to decide. *Villages Development Co. v. Secretary of the Executive Office of Environmental Affairs,* 410 Mass. 100, 105 (1991).

Massachusetts has long followed the rule that in the absence of a statutory directive to the contrary, the administrative remedies should be exhausted before resort to the courts. *East Chop Tennis Club v. Massachusetts Commission Against Discrimination,* 364 Mass. 444, 448 (1973). Courts must be careful not to invade the province of an administrative board. *Saint Luke's Hospital v. Labor Relations Comm.,* 320 Mass. 467, 470 (1946) . The instances are rare where circumstances will require such interference. *Id.* This doctrine of exhaustion of administrative remedies applies to both actions under G.L. c. 30A and G.L. c. 231A. See *Wilczewski v. Commissioner of the Department of Environmental Quality Engineering,* 404 Mass. 787, 792 (1989); *Gill v. Board of Registration of Psychologists,* 399 Mass. 724, 728-729 (1987).

The administrative scheme of relief available to plaintiffs is set forth in G.L. c. 131, § 40, and the regulations promulgated pursuant thereto. The Commonwealth's power to speak with finality on wetlands is manifested throughout the Legislature's comprehensive, protective regulation in this area. *Hamilton v. Conservation Commission of Orleans,* 12 Mass. App. Ct. 359, 367 (1981). Once the Department has issued its final order following an adjudicatory hearing, the administrative process is exhausted. *Wilczewski, supra* at 792.

It is undisputed that no final order has been issued by the Department with respect to the Nelsons' property. The Hicks currently have permission to build an artificial dune. Consequently, plaintiffs have clearly failed to exhaust their administrative remedies under the statutory and regulatory provisions governing wetland areas. The Hicks' argument that administrative proceedings will be futile in this instance is without merit. Although the Department has indicated that it intends to issue an order superceding that of the Commission regarding the Hicks' property, the Hicks would then be entitled to an adjudicatory hearing on any superceding order and a final order. The court therefore rules that counts I, III and IV of plaintiffs' complaint are dismissed for failure to exhaust administrative remedies.

The court further rules that count II of plaintiffs' complaint survives the instant motion. "Where an administrative board is created by or is acting under a statute that is violative of the Federal or a State Constitution . . . then one may challenge the jurisdiction of the board by invoking the aid of the courts and need not wait until the board has made a final order." *Saint Lukes Hospital, supra* at 470. Since plaintiffs have met the narrow exception to the exhaustion of administrative remedies requirement by contending that G.L. c. 131, § 40, is unconstitutional, this claim is not dismissed. See *Wilczewski, supra* at 794.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that defendant's motion to dismiss is **ALLOWED** as to

counts I, III and IV of plaintiffs' complaint and **DENIED** as to count II of plaintiffs' complaint.

/s/ John M. Xifaras
John M. Xifaras
Justice of the
Superior Court

Dated: May 31, 1991

Exhibit 1

310 CMR: DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING

10.99: continued

Form 3 LOGO Commonwealth of Massachusetts

[SEAL]
OEOE File No.

(To be provided by DEOE)

City/Town Chatham

Assistant Nelson

Notice of Intent
Under the
Massachusetts Wetlands Protection Act,
G.L. c. 131, § 40
and
Application for a Department of the Army Permit

Part I: General Information

1. Location: Street Address 27 Morris Island Road Lot Number 10A & 11. Assessors Map 16A

2. Project: Type Artificial Dune Description Internally Armored Artificial Dune behind a Primary Dune

3. Registry: County Barnstable Current Book ___ & Page ___

   Certificate (if Registered Land) 29197, 68253

4. Applicant Alfred B. Nelson Tel. 318-226-0700

   Address 401 Edwards – 1500, Shreveport, LA 71101

5. Property Owner Same Tel. _____

   Address _____

6. Representative E.I.I. Engineering Services, Inc. Tel. 617-494-9224

   Address One Kendall Square, Building 600, Cambridge, MA 02139

7. Have the Conservation Commission and the DEOE Regional Office each been sent, by certified mail or hand delivery, 2 copies of completed Notice of Intent, with supporting plans and documents?

   Yes [X] No [ ]

8. Have all obtainable permits, variances and approvals required by local by-law been obtained?

   Yes [ ] No [ ]

Obtained:	Applied For:	Not Applied For:
Not Required		

9. Is any portion of the site subject to a Wetlands Restriction Order pursuant to G.L. c. 131, § 40A or G.L. c. 130, § 1057 Yes [X] No [ ] M.G.L., c. 130, s. 105, paragraph 3G; 4E

10. List all plans and supporting documents submitted with this Notice of Intent.

Identifying Number/Letter	Title, Date
E.I.T. #88-43	William Lieberman, P.E. 6/9/89

11. Check those resource areas within which work is PROPOSED:

(a) [ ] Buffer Zone

(b) Inland:

[ ] Bank*
[ ] Bordering Vegetated Wetland*
[ ] Land Under Water Body & Waterway*

Land Subject to Flooding
[ ] Bordering
[ ] Isolated

(c) Coastal:

[ ] Land Under the Ocean*
[ ] Coastal Beach*
[ ] Barrier Beach
[ ] Rocky Intertidal Shore*
[ ] Land Under Salt Pond*
[ ] Fish Run*

[ ] Designated Port Area*
[XX] Coastal Dune
[ ] Coastal Bank
[ ] Salt Marsh*
[ ] Land Containing Shellfish*

* * *

---

* Likely to involve U.S. Army Corps of Engineers concurrent jurisdictions. See General Instructions for Completing Notice of Intent.

I hereby certify under the pains and penalties of perjury that the foregoing Notice of Intent and accompanying plans, documents and supporting data are true and complete, to the best of my knowledge.

Signature of Applicant	Date
/s/ Robert E. Weaver	6-22-89
Signature of Applicant's Representative	Date

FORM HID 100 (TEST)
1 MAY 82

"Exception to ENG Form 4345 approved by HQUSACE, 6 May 1982".

"This document contains a joint Department of the Army and State of Massachusetts application for a permit to obtain permission to perform activities in United States waters. The Office of Management and Budget (OMB) has approved those questions required by the US Army Corps of Engineers. OMB Number 0702-0036 and expiration date of 30 September 1983 applies". This statement will be set in 6 point type.

U.S.G.S. CHATHAM QUADRANGLE

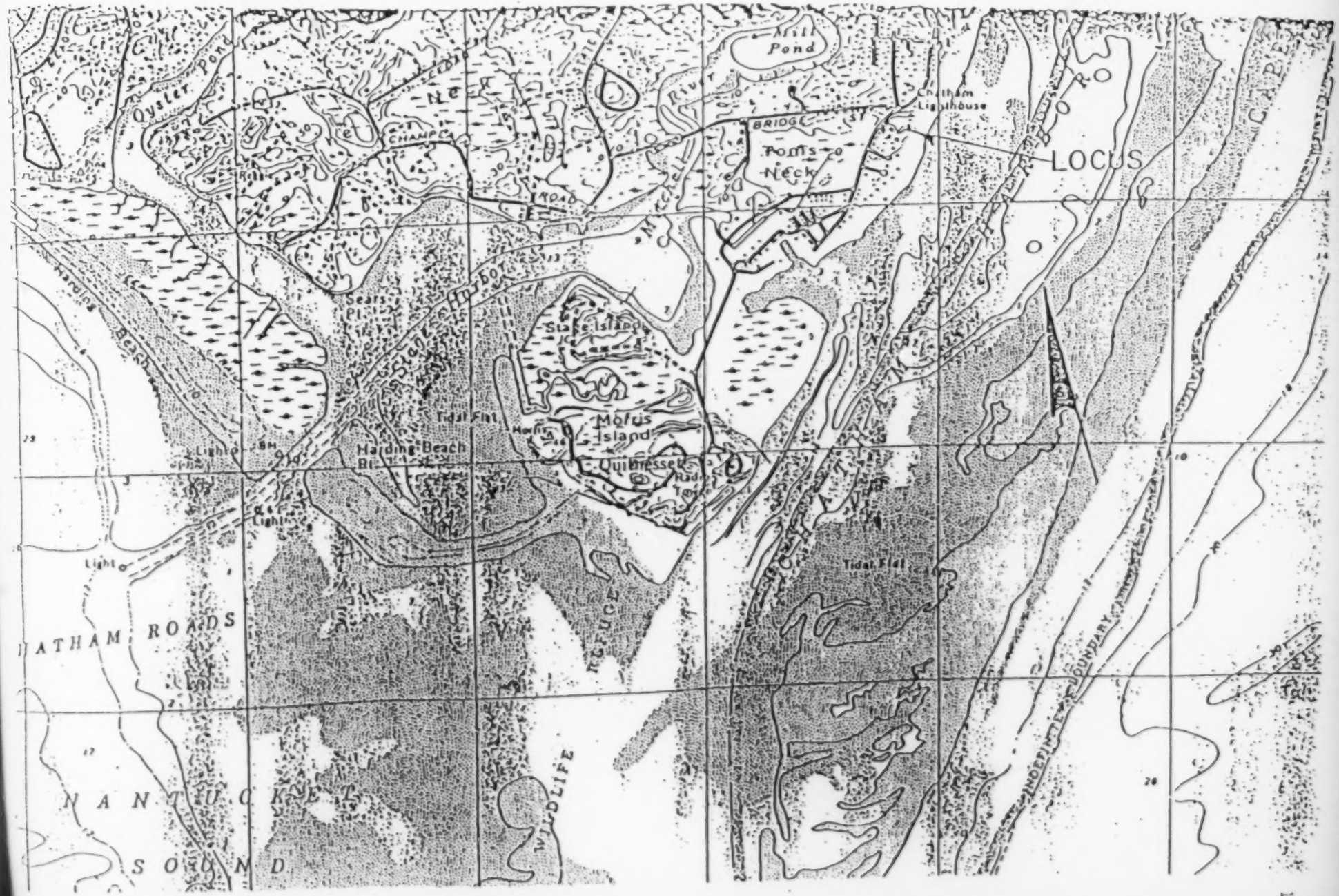

EXHIBIT "B"

TOWN OF CHATHAM

Conservation Commission

FINDINGS ON APPLICATION FOR PERMIT UNDER WETLANDS PROTECTION BY-LAW

FORM 505
FILE NUMBER
SE -10 804

DATE OF ISSUANCE
Sept. 22, 1989

APPLICANT: Alfred Nelson

ADDRESS: 401 Edwards-1500

Shreveport, Louisiana, 71101

OWNER: _____

(If other than applicant)

ADDRESS: _____

LOCATION OF WORK:27 Morris Island Road

After public hearing in accordance with open meeting law M.G.L. Ch. 39, s. 23B, closed on _____, the Chatham Conservation Commission, in accordance with the Town of Chatham Wetlands By-Law finds:

[ ] Permit is granted – work may proceed;

[X] Permit is denied; See page 5-3A

Conservation Commission:

/s/ D. B. Wells
/s/ A. Louis Rogers
/s/ Alice Hiscock
/s/ Paul Chamberlin
/s/ Katherine Abreu
/s/ John Tyner

[LOGO]
Daniel S. Greenbaum
Commissioner

Gilbert T. Joly
Regional Director

The Commonwealth
Executive Office of Environmental Affairs
Department of
Environmental Quality Engineering
Southeast Region
Lakeville Hospital, Lakeville, Massachusetts 02341

DEQE
NOW IS
THE DEPARTMENT OF
ENVIRONMENTAL PROTECTION

March 29, 1990

Robert E. Weaver
E.I.T. Engineering
Services, Inc.
One Kendall Square
Building 600, 2nd Floor
Cambridge, MA 02139

RE: CHATHAM–Wetlands
File No. SE 10-804
Superseding Order of
Conditions

Dear Mr. Weaver:

Following an in-depth review of the above-referenced file and in accordance with Massachusetts General Laws, Chapter 131, Section 40, the Department of Environmental Protection has issued the enclosed Superseding Order of Conditions. This Order denies the project as proposed. The Department has determined that the project area is significant to the statutory interests of storm damage prevention and flood control.

The project proposes the construction of an internally armored artificial dune within a coastal dune resource area as defined at 310 CMR 10.28 (2) of the Wetlands Protection Act Regulations. Said structure would consist of a rock dike covered with sand and vegetation.

The Department has determined that the proposed internally armored artificial dune would affect the ability of waves to remove sand from the dune and interfere with the landward or lateral movement of the dune. Therefore, the Department has found that the proposed project does not meet the performance standard for coastal dunes at 310 CMR 10.28 (3) (a) and (d) and, thus, should not be allowed.

The Department has also determined that the proposed project would fall within a restricted dune (209R) pursuant to M.G.L., Chapter 130, Section 105. The Department has determined that the proposed project would obstruct the movement of sediment and would adversely affect adjacent properties and downcoast areas. Therefore, the Department has found that the proposed project would not comply with 3 (G) and 4 (E) of said Restriction Order.

Please be advised that the Department would encourage the applicant to reconsider the focus of coastal erosion abatement at this site towards beach nourishment, as per 310 CMR 10.27 (5), and away from structural solutions. Alternatively, the applicant should consider relocating any endangered structures landward to more protected areas.

In the opinion of the Department, the reasons given here are sufficient to justify this Superseding Order of

Conditions. However, the Department reserves the right, should there be further proceedings in this matter, to raise additional issues and present further evidence as may be appropriate.

Very truly yours,

/s/ Elizabeth A. Kouloheras
Elizabeth A. Kouloheras,
Chief
Wetlands Section

K/JM/sl

cc: Conservation Commission

Alfred Nelson
401 Edwards – 1500
Sheveport, LA 71101

Kevin M. Foster
Attorney at Law
9 Pearl Street
Leominster, MA 01453

CZM
100 Cambridge Street
Boston, MA 02202
ATTN: Jim O'Connell

310 CMR 10.99

Form 3 LOGO Commonwealth
of Massachusetts

[SEAL]
OEOE File No.

(To be provided by DEOE)

City/Town _____

Applicant HICKS

Notice of Intent
Under the
Massachusetts Wetlands Protection Act,
G.L. c. 131, § 40
and
Application for a Department of the Army Permit
AND TOWN OF CHATHAM WETLANDS BYLAW

Part I: General Information

1. Location: Street Address 40 DUNE DRIVE Lot Number C5 Assessors Map 16A Lot 5, Plan Book 187, Page 1

2. Project: Type Artificial Dune Description Proposed Internally Armored Artificial Dune behind a Primary Dune for the purpose of "Storm damage prevention and Flood control."

3. Registry: County BARNSTABLE Current Book 1342 & Page 997

   Certificate (if Registered Land) _____

4. Applicant LEWIS W. HICKS III Tel. (508) 945-1959

   Address P.O. Box 6308, Lawrenceville, New Jersey 08648

5. Property Owner Same Tel. _____

   Address _____

6. Representative E.I.T. Engineering Services, Inc. Tel. (508) 420-0564

   Address 141 Route 6A, Salt Pond Bldg. P.O. Box 1729, Sandwich, MA 02563

7. a. Have the Conservation Commission and the Department's Regional Office each been sent, by certified mail or hand delivery, 2 copies of completed Notice of Intent, with supporting plans and documents?

      Yes [X] No [ ]

   b. Has the fee been submitted?

      [X] Yes [ ] No

   c. Total Filing Fee Submitted $250.00

   d. City/Town Share of Filing Fee $137.50 (sent to City/Town)
      State Share of Filing Fee $112.50 (1/2 of fee in excess of $25, set to DEP)

   e. Is a brief statement attached indicating how the applicant calculated the fee? [X] Yes [ ] No

      Filing Fee Calculation Worksheet attached

8. Have all obtainable permits, variances and approvals required by local by-law been obtained?

   Yes [ ] No [ ]

Obtained:	Applied For:	Not Applied For:
_____	Wetland By-law	_____
_____	_____	_____
_____	_____	_____

9. Is any portion of the site subject to a Wetlands Restriction Order pursuant to G.L. c. 131, § 40A or G.L. c. 130, § 105? Yes [X] No [ ]

10. List all plans and supporting documents submitted with this Notice of intent.

Identifying Number/Letter	Title, Date
89-38	Artificial Dune Plan, William Lieberman, P.E. 11-3-89 2-1-90

11. Check those resource areas within which work is PROPOSED:

(a) [ ] Buffer Zone

(b) Inland:

[ ] Bank*
[ ] Bordering Vegetated Wetland*
[ ] Land Under Water Body & Waterway*

Land Subject to Flooding
[ ] Bordering
[ ] Isolated

(c) Coastal:

[ ] Land Under the Ocean*
[ ] Coastal Beach*
[ ] Barrier Beach
[ ] Rocky Intertidal Shore*
[ ] Land Under Salt Pond*
[ ] Fish Run*

[ ] Designated Port Area*
[XX] Coastal Dune
[ ] Coastal Bank
[ ] Salt Marsh*
[ ] Land Containing Shellfish*

---

* Likely to involve U.S. Army Corps of Engineers concurrent jurisdictions. See General Instructions for Completing Notice of Intent.

* * *

I hereby certify under the pains and penalties of perjury that the foregoing Notice of Intent and accompanying plans, documents and supporting data are true and complete, to the best of my knowledge.

Signature of Applicant	Date
/s/ Robert E. Weaver	2/5/90
E.I.T. Engineering Services, Inc.	Date
Signature of Applicant's Representative	

FORM NED 100 (TEST)
1 MAY 82

"Exception to ENG Form 4345 approved by HQUSACE, 6 May 1982".

"This document contains a joint Department of the Army and State of Massachusetts application for a permit to obtain permission to perform activities in United States waters. The Office of Management and Budget (OMB) has approved those questions required by the US Army Corps of Engineers. OMB Number 0702-0036 and expiration date of 30 September 1983 applies". This statement will be set in 6 point type.

Chatham
Oyster Pond
Mill Pond
Black Pond
Little Mill Pond
Stage Harbor
Morris Island
Quitness
Tom's Neck
Hiding Beach
Seals Pl
Long Pl
Stetson Cove
Aunt Lydias Cove
Fish Island
Chatham Lighthouse
LOCUS
CAPE COD NATIONA
USGS
CHATHAM QUADRANGLE

E.I.T. Engineering Services, Inc.

One Kendall Square, Building 600, 2nd Floor,
Cambridge, MA 02139
Telephone: (617) 494-9224, FAX: (617) 494-9227,
Telex: 229079

Applicant: Lewis W. Hicks III,
40 Dune Drive, Chatham, MA

NARRATIVE

The applicant's property is located on Dune Drive off of Morris Island Road. It is the center property in a long stretch extending from the Chatham Tennis Club to Outermost Harbor Marina which have been delineated by Coastal Zone Management as "Dune Properties". The area experienced a substantial build up of sand shortly after the breach in Nauset Beach of January 2, 1987. Conditions have changed dramatically since the Spring of 1989, with the applicant along with his neighbors experiencing a loss of approximately 160' of property. A major portion of the land (120') has been lost during the fall and early winter of 1989. His home is now protected only by a narrow berm and a primary dune which is rapidly being eaten away by severe erosion. Unless the erosion is stopped, serious damage or loss will very likely occur to the dwelling resulting in an additional threat to public health and safety. The occurrence of a major coastal storm is likely to accelerate this threat in the entire area.

The proposed construction would be placed in a trough area between the primary dune and the dwelling. The structure would function as and artificial dune. It is composed of a sand core, covered by filter fabric and rocks and then covered by sand and vegetation. During

major storms or severe erosion the sand cover may be washed away. In this case the structure would function as a wave energy absorber, protecting the properties behind it. When conditions return to normal, the structure should again be covered by the normal sand transport process.

This type of structure was selected due to the low elevation of the properties behind it. Most engineering structures that are destroyed in a major hurricane are destroyed not by the initial storm surge, but by undermining of the structure from behind caused by the recession of water from the surge. This structure has been designed with overtopping expected and is two sided. This will prevent undermining from behind and trap sand and debris normally lost by the receding flood waters. It is a structure widely used and proven even in the construction of underwater jetties and breakwaters that are subject to constant wave action. This type of structure has withstood hurricane forces several times in the Fernandina Beach area of Florida. Locally the groin field that exists and is covered just south of the applicants property was built in this manner under a WPA project. In 1961, The Division of Waterways, then under the Massachusetts Department of Public works, under contract #2325 built a stone mound project, East of Nobscusset Point in the Vicinity of Dr. Lord's Road for the town of Dennis. It has worked well, caused no environmental problems, and except after a major Northeast storm it is difficult to find.

We recognize that the "presumption of significance" must be overcome and offer the following into evidence and request the Chatham Conservation Commission

make that determination on Form 7, as provided for in 310 CMR: 10.24:(3) General Provisions. It is our contention that the described engineering structure can protect the statutory interests at stake where the presumptions cannot.

310 CMR: 10.00: IV. B. *Significance;* states "regulation of work within such areas can be justified only if the area contributes in some significant way to the interests identified in the Act. These presumptions can be overcome by showing that the resource area in question functions atypically." (The issuing authority) "can be influenced so as to insure that each resource area is accorded its proper ecological value, no more or no less."

The presumption of significance of dune material in the area on the theory that it provides storm damage protection or flood control when assaulted by direct Atlantic waves should have already been overcome by its performance in the area to the North where several homes have been lost.

In an interview with the "Cape Codder", January 15, 1988, Dr. Grahamn Giess from Woods Hole Oceanographic Institute, and one of the authors of the regulation was quoted as saying, "I'm not sure with the type of shoreline we have here that those regulations apply. The regulations were written with an equilibrium shoreline in mind, a shoreline that remains constant throughout time. This is not an equilibrium shoreline. I think it would be possible to make a valid interpretation finding that the features here are not covered by those regulations which prohibit protection from erosion." In the same article Jeff Benoit, coastal geologist with CZM was quoted as saying,

"when you apply the regulations you mean to preserve as much as possible." This has not been the case in Chatham when the strictest interpretation of the regulation has been applied.

The amount of sand any of these properties could contribute to the system is insignificant when compared to the thousands of yards passing through the breach each day and with the amount of sand continuously in suspension in the water. Dr. Giese's report and the Army Corps report indicate that the sand has mostly clogged the channel to the Fish Pier and Marshall's Marina, which now require constant dredging to keep them open and have done relatively little toward building any long term beaches.

The proposed project is consistent with the Artificial Dune approved for Andrew Harding Lane by the Town of Chatham and The Commonwealth of Massachusetts in early 1988. That project would have impeded the dunes ability to erode to a coastal beach.

The project as proposed will contribute to the protection of the interests identified in the Act.

It will *protect public and private water supply* by preventing loss of town water hookups and mains.

It will *protect ground water supply* by preventing inundation of salt water.

It will provide *flood control.*

It will provide an effective method of *storm damage prevention.*

It will *prevent pollution* by protecting septic systems and preventing the erosion of an area that is reported to be the old town dump.

It will *protect land containing shellfish* by restraining further smothering of their habitat by excess sand.

It will contribute to the *protection of fisheries* by protecting the capacity of the area by reducing shoaling.

It will increase the *wildlife habitat* by adding another dune which is likely to remain intact.

Respectfully,

/s/ Robert E. Weaver
Robert E. Weaver
Environmental Consultant

TOWN OF CHATHAM

Conservation Commission

FINDINGS ON APPLICATION FOR PERMIT UNDER WETLANDS PROTECTION BY-LAW

FORM 505
FILE NUMBER
SE -10 855

DATE OF ISSUANCE
April 2, 1990

APPLICANT: Lewis Hicks III

ADDRESS: P.O. Box 6308
Lawrenceville, N.J. 08648

OWNER: _____
(If other than applicant)

ADDRESS: _____

LOCATION OF WORK:40 Dune Drive

After public hearing in accordance with open meeting law M.G.L. Ch. 39, s. 23B, closed on March 21, 1990, the Chatham Conservation Commission, in accordance with the Town of Chatham Wetlands By-Law finds:

[ ] Permit is granted – work may proceed;

[X] Permit is denied; See Exhibit "A"

Conservation Commission:

/s/ Alice Hiscock
/s/ Eunice Burley
/s/ Douglas B. Wells
/s/ Katherine Abreu
/s/ A. Louis Rogers

[LOGO]
Daniel S. Greenbaum
Commissioner

Gilbert T. Joly
Regional Director

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Protection
Southeast Region
Lakeville Hospital, Lakeville, Massachusetts 02347

November 20, 1990

Kevin M. Foster
Roberts, Farrell & Rowley
26 George Ryder Road South
P.O. Box 1238
West Chatham, Massachusetts
02669

RE: CHATHAM–Wetlands
File No. SE 10-855
Superseding Order of
Conditions

Dear Mr. Foster:

Following an in-depth review of the above-referenced file and in accordance with Massachusetts General Laws, Chapter 131, Section 40, the Department of Environmental Protection has issued the enclosed Superseding Order of Conditions. This Order denies the project as proposed. The Department has determined that the project area is significant to the statutory interests of storm damage prevention and flood control.

The project proposes the construction of an internally armored artificial dune within a coastal dune resource area as defined at 310 CMR 10.28 (2) of the Wetlands Protection Act Regulations. Said structure would consist of a rock dike covered with sand and vegetation.

The Department waived an on-site inspection pursuant to 310 CMR 10.05 (7) (i) of the Wetlands Protection Act Regulations because said inspection would not of been necessary or useful to a proper and complete review of the proposed project.

The Department has determined that the proposed internally armored artificial dune would affect the ability of waves to remove sand from the dune and interfere with the landward or lateral movement of the dune. Therefore, the Department has found that the proposed project does not meet the performance standard for coastal dunes at 310 CMR 10.28 (3) (a) and (d) and, thus, should not be allowed.

The Department has also determined that the proposed project would fall within a restricted dune (209R) pursuant to M.G.L., Chapter 130, Section 105. The Department has determined that the proposed project would obstruct the movement of sediment and would adversely affect adjacent properties and downcoast areas. Therefore, the Department has found that the proposed project would not comply with 3 (G) and 4(E) of said Restriction Order.

Please be advised that the Department would encourage the applicant to reconsider the focus of coastal erosion abatement at this site towards beach nourishment, as per 310 CMR 10.27 (5), and away from structural solutions. Alternatively, the applicant should consider relocating any endangered structures landward to more protected areas.

In the opinion of the Department, the reasons given here are sufficient to justify this Superseding Order of

Conditions. However, the Department reserves the right, should there be further proceedings in this matter, to raise additional issues and present further evidence as may be appropriate.

Very truly yours,

/s/ Elizabeth A. Kouloheras
Elizabeth A. Kouloheras,
Chief
Wetlands Section

K/JM/sl

cc: Chatham Conservation Commission

Lewis W. Hicks III
P.O. Box 6308
Lawrenceville, NJ 08648

E.I.T. Engineering Services Inc.
141 Route 6A, Salt Pond Bldg.
P.O. Box 1729
Sandwich, MA 02563

DEP – Wetlands Conservancy Program
One Winter Street
Boston, MA 02108
ATTN. Ray Marino

CZM
100 Cambridge Street
Boston, MA 02202
ATTN: Jim O'Connell

CONSERVATION COMMISSION
FORM 300

310 CMR 10.99
Form 3 LOGO Commonwealth
of Massachusetts

[SEAL]
DEP File No.

(To be provided by DEOE)

City/Town Chatham

Applicant Alfred B. Nelson

Notice of Intent
Under the
Massachusetts Wetlands Protection Act,
G.L. c. 131, § 40
and
Application for a Department of the Army Permit

Part I: General Information

1. Location: Street Address 27 Morris Island Road Lot Number 16A, Parcels 10A & 11

2. Project: Type To construct Description To construct a stone breakwater for shorefront protection

3. Registry: County Barnstable Current Book ___ & Page ___

   Certificate (if Registered Land) 2917

4. Applicant Alfred B. Nelson Tel. (813) 262-7505

   Address P.O. Box 8995, Naples, FL 33940

5. Property Owner same as above Tel. –

   Address –

6. Representative Coastal Engineering Co., Inc. Tel. (508) 255-6511

   Address 260 Cranberry Highway, Orleans, MA 02653

7. a. Have the Conservation Commission and the Department's Regional Office each been sent, by certified mail or hand delivery, 2 copies of completed Notice of Intent, with supporting plans and documents?

   Yes [X] No [ ]

   b. Has the fee been submitted?

   [X] Yes [ ] No

   c. Total Filing Fee Submitted $900.00

   d. City/Town Share of Filing Fee $462.50 (sent to City/Town)
   State Share of Filing Fee $437.50 (1/2 of fee in excess of $25, set to DEP)

   e. Is a brief statement attached indicating how the applicant calculated the fee? [X] Yes [ ] No

8. Have all obtainable permits, variances and approvals required by local by-law been obtained?

   Yes [X] No [ ]

Obtained:	Applied For:	Not Applied For:
	None applicable at this time.	

9. Is any portion of the site subject to a Wetlands Restriction Order pursuant to G.L. c. 131, § 40A or G.L. c. 130, § 105? Yes [ ] No [X]

10. List all plans and supporting documents submitted with this Notice of intent.

Identifying Number/Letter	Title, Date
P-1	Proposed Shorefront Protection, Plan View, Sections and Details 11/22/91

11. Check those resource areas within which work is PROPOSED:

(a) [ ] Buffer Zone

(b) Inland:

[ ] Bank*
[ ] Bordering Vegetated Wetland*
[ ] Land Under Water Body & Waterway*

Land Subject to Flooding
[ ] Bordering
[ ] Isolated

(c) Coastal:

[ ] Land Under the Ocean*
[X] Coastal Beach*
[ ] Barrier Beach
[ ] Rocky Intertidal Shore*
[ ] Land Under Salt Pond*
[ ] Fish Run*

[ ] Designated Port Area*
[ ] Coastal Dune
[ ] Coastal Bank
[ ] Salt Marsh*
[ ] Land Containing Shellfish*

---

* Likely to involve U.S. Army Corps of Engineers concurrent jurisdictions. See General Instructions for Completing Notice of Intent.

* * *

I hereby certify under the pains and penalties of perjury that the foregoing Notice of Intent and accompanying plans, documents and supporting data are true and complete, to the best of my knowledge.

Alfred B. Nelson	12/23/91
Signature of Applicant	Date
/s/ Thomas W. Joy, P.E.	12/23/91
Signature of Applicant's Representative	Date

FORM MED 100 (TEST)
1 MAY 82

"Exception to ENG Form 4345 approved by HQUSACE, 6 May 1982".

"This document contains a joint Department of the Army and State of Massachusetts application for a permit to obtain permission to perform activities in United States waters. The Office of Management and Budget (OMB) has approved those questions required by the US Army Corps of Engineers. OMB Number 0702-0036 and expiration date of 30 September 1983 applies". This statement will be set in 6 point type.

TOWN OF CHATHAM

Conservation Commission

FINDINGS ON APPLICATION FOR PERMIT UNDER WETLANDS PROTECTION BY-LAW

FORM 505
FILE NUMBER
SE -10 987

DATE OF ISSUANCE
January 30, 1992

APPLICANT: Alfred Nelson

ADDRESS: P.O. Box 8995
Naples, FL 33940

OWNER: _____
(If other than applicant)

ADDRESS: _____

LOCATION OF WORK: 27 Morris Island Road

After public hearing in accordance with open meeting law M.G.L. Ch. 39, s. 23B, closed on January 28, 1992, the Chatham Conservation Commission, in accordance with the Town of Chatham Wetlands By-Law finds:

[ ] Permit is granted – work may proceed;

[X] Permit is denied;

This project is denied because it does not meet the performance standards of the Town of Chatham Wetlands Protection By-Law, 2.02 and 2.03.

Conservation Commission:

/s/ John Geiger
/s/ Illegible
/s/ A. Louis Rogers
/s/ Alice Hiscock
/s/ Illegible

Plans:

Title	Dated	Signed and Stamped by:	On File with:
Plan for Proposed Shorefront Protection	12/26/91	Thomas W. Joy, P.E.	Commission

Special Conditions (Use additional paper if necessary)

PERMISSION FOR THIS PROJECT IS DENIED

FINDINGS:

1. The Commission finds that this project is conceptually no different from the proposal for an armored dune (SE 10-804) which was denied by the Commission in September of 1989 and, under the Town of Chatham Wetlands Protection By-Law, again in April of 1990 after a remand from Superior Court. If anything, this project is more extensive.

2. The Commission finds that the proposed construction would take place in a Coastal Dune and on a Coastal Beach, and that these resource areas are still significant to storm damage and flood control, particularly with respect to downdrift sediment supply.

3. Therefore the Commission's conclusion must be governed by the performance standards given in 310 CMR 10.27 and 10.28.

CONCLUSIONS:

1. The proposed structure would have unacceptable environmental impacts on the foreshore, on the abutters and on the general area.

2. The proposal does not and cannot meet the performance standards in 310 CMR 10.27 and 10.28.

(Leave Space Blank)

[LOGO] Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of
Environmental Protection
Southeast Regional Office

William F. Weld
Governor
Daniel S. Greenbaum
Commissioner

October 20, 1992

Nicholas B. Soutter, Esq.
Attorney at Law
One Washington Street
Wellesley, Massachusetts
02181

RE: CHATHAM–Wetlands
File No. SE 10-987
Superseding Order of
Conditions – Denial

Dear Mr. Soutter:

Following an in-depth review of the above-referenced file and in accordance with Massachusetts General Laws, Chapter 131, Section 40, the Department of Environmental Protection has issued the enclosed Superseding Order of Conditions. This Order denies the project as proposed. The Department has determined that the project area is significant to the statutory interests of storm damage prevention and flood control.

The project proposes the construction of a stone breakwater at the landward edge of a Coastal Beach (310 CMR 10.27) and within a Coastal Dune (310 CMR 10.28). Said structure would consist of a rock dike partially covered with sand and vegetation. The proposed structure is essentially the same as the previously proposed internally armored artificial dune that the Department

denied on March 29, 1990, for the same property under Wetlands File No. SE 10-804.

The Department has determined that the proposed breakwater would affect the ability of the coastal beach to change its form in response to changes in wave conditions and would interfere with the ability of the coastal beach to erode and act as a sediment source for coastal areas downdrift of the project site. Further, the Department has determined that the proposed breakwater would increase erosion and change the form of the coastal beach and downdrift coastal beaches. Therefore, the Department has determined that the proposed breakwater would not comply with the performance standards imposed for Coastal Beaches at 310 CMR 10.27(3).

The Department has also determined that the proposed breakwater would interfere with the landward or lateral movement of the coastal dune portion of the site. Specifically, the proposed breakwater would interfere with the exchange of sediment between the beach and dune. Further, the proposed breakwater would affect the ability of waves to remove sand from the dune. Therefore, the Department has found that the proposed breakwater would not comply with the performance standards for Coastal Dunes at 310 CMR 10.28(3)(a) and (d).

Further, the Department has determined that the proposed project would fall within a restricted dune (209R) pursuant to M.G.L., Chapter 130, Section 105. The Department has determined that the proposed project would obstruct the movement of sediment and would adversely affect adjacent properties and downcoast areas. Therefore, the Department has found that the proposed project

would not comply with 3 (G) and 4 (E) of said Restriction Order.

Please be advised that the Department would strongly encourage you to consider the option of relocating the dwelling landward to a more protected area of the property and placing the dwelling on an open pile foundation elevated above the FEMA-designated 100-year flood level. Furthermore, the Department would advise you to reconsider the focus of coastal erosion abatement at this site away from structural solutions and towards non-structural ones, as per 310 CMR 10.27(5). Non-structural approaches (so-called "soft engineering") would include beach and dune nourishment and dune enhancement through the utilization of sandtrapping devices and vegetation. Nourishment can be an effective means of retarding coastal beach and dune loss and affording protection to nearby buildings and/or structures.

Please be reminded that the proposed project exceeds the wetland threshold as found in 301 CMR 11.26(7)(a)2b of the MEPA Regulations. The Department's May 27, 1992, letter also advised you of the necessity to comply with MEPA before the Department could permit the proposed project. Your letter of June 2, 1992, requests the Department to waive MEPA requirements and issue a Superseding Order of Conditions. The Department does not have the authority to waive MEPA requirements as only the Secretary of Environmental Affairs, pursuant to 301 CMR 11.18, has that authority. The enclosed Superseding Order of Conditions denying the project proposal is being issued, as you have requested, prior to MEPA compliance. Thus, your client may file a new Notice of Intent when the MEPA process has been completed.

Please be advised that, in the event the enclosed Superseding Order of Conditions is appealed, the Department will require the completion of the MEPA review process in accordance with 310 CMR 10.07 of the Wetlands Protection Act Regulations before issuing a Final Order of Conditions.

In the opinion of the Department, the reasons given here are sufficient to justify this Superseding Order of Conditions. However, the Department reserves the right, should there be further proceedings in this matter, to raise additional issues and present further evidence as may be appropriate.

Very truly yours,

/s/ Elizabeth A. Kouloheras
Elizabeth A. Kouloheras,
Chief
Wetlands Section

K/JM/lr

cc: Chatham Conservation Commission
549 Main St.
Chatham, MA 02633

Alfred Nelson
P.O. Box 8995
Naples, Florida 33940
CERTIFIED MAIL #P 622 583 122
RETURN RECEIPT REQUESTED

Coastal Engineering Co., Inc.
260 Cranberry Highway
Orleans, MA 02653

Madelyn Morris, Esq.
Assistant Attorney General
Office of the Attorney General
John W. McCormack Building
Boston, MA 02202

CZM
100 Cambridge Street
Boston, MA 02202
ATTN: Jim O'Connell

DEP-OGC, 3rd Floor
ATTN: Carl Dierker, Esq.

DEP-DWW, 8th Floor
ATTN: Margaret Finn

cc: MEPA – Unit
100 Cambridge Street
Boston, MA 02202

October 22, 1992

Commonwealth of Massachusetts
Department of Environmental Protection
P.O. Box 4062
Boston, MA 02211

Chatham – Wetlands File No. SE 10-987
Superseding Order of Conditions – Denial
Alfred B. Nelson, 27 Morris Is. Road, Chatham.

The Superseding Order of Conditions in the above-captioned matter is appealed for the following reasons.

1) It is one mile from the Nelson house to Morris Island south. Average elevation is 10 feet measured from the coast to 300 feet inland. (The last Chatham flood penetrated 300 feet). This area contains 590,000 cubic yards of sand.

The Department has allowed walls immediately to the north of the Nelson property that cover 3,600 feet of coast. Here there is an average elevation of 20 feet. Measured inland 300 feet this area contains 800,000 cubic yards of sand. This is a dune area under the regulation.

By allowing these walls, the Department has prevented the Nelsons from getting the sand they need to save their property. A seawall is their only remedy.

2) Elevating the house would cost in excess of $100,000. At the present rate of flooding, the septic system would be lost within 5 years and the Department would condemn the house. Elevation is impracticable.

3) It would cost more than $250,000 to move the house. At present levels of flooding it would be threatened within 5 years and lost within 10. Such a move is

illegal under the regulations and local zoning. Moving is not an alternative.

4) The bluff in front of the Nelson house is at elevation 14. This is the highest elevation for a half a mile to the south.

Permanent flooding 300 feet inland is likely. This will destroy between 40 to 80 properties worth 30 to 60 million dollars, a large wetland and the road to Morris Island.

Morris Island losses will exceed 10 million dollars. Stage Harbor will be choked with sand and the wetlands associated with it flooded.

The Nelson seawall is an environmental and economic necessity.

5) The Department waived the MEPA [Ex. 1] and dune/bank [Ex. 2] requirements for the 31 seawalls built north of Nelson since 1987.

6) In June of 1992, the Nelsons advanced $30,000 representing the homeowner's share of an EIR for the flood area from the Fish Pier to Morris Island.

This money was used by the Department to fund an EIR covering half that distance, stopping 25 feet short of the Nelson property. The Department cannot now claim that Mr. Nelson owes it an EIR.

7) Of the 58 parcels of land covered by the abbreviated EIR, 20 are owned by Chatham residents. All 20 have seawalls, most of them on dune and most of them built below Department specifications for Chatham seawalls.

Only 11 non-resident parcels, necessary for the defense of resident-owned properties, have seawalls.

All of the 6 coastal houses lost so far were owned by non-residents who had applied for seawalls. Three were denied permits. The others were given permits with impossible conditions. These conditions were waived for Chatham residents.

The Department denied the Nelsons a seawall because they are not residents of Chatham. This is a violation of Federal and State constitutions and the 1964 Civil Rights Act.

8) It is the obligation of the Department to act promptly.

The Nelson's first applied for a seawall in 1989 and again in 1991. During that time they have lost 280 feet of beach and are now 19 feet from the sea. The Nelsons have never been given a hearing on these denials.

There has never been a hearing on any seawall denial in Chatham. All denials have been to non-residents. The Department says that there must first be an Environmental Impact Report. Yet it has waived that requirement 31 times since 1987.

The Nelsons have made every effort to accomodate [sic] the Department including making available experts in coastal geology and engineering, spending $30,000 on beach nourishment, $110,000 on sand bags and $30,000 on an EIR, all mandated by the Department.

The Department admits that beach nourishment is temporary and stopgap [Ex. 3] and knows that sandbags do not work in Chatham [Ex. 4]. In ordering sandbags for

the Nelson's it denied the use of trap rock to support them, a standard engineering practice [Ex. 5].

The standards mandated by the Department for an EIR in Chatham were set forth in a public letter in October of 1988 [Ex. 6].

The Nelsons advanced $30,000 toward completion of this EIR. The Department used their money to produce an altogether different and harmful document.

This EIR only covers walls approved by the Department. MEPA waivers, dune/bank violations, substandard construction and discrimination are not discussed. It covers less than half the mandated area.

The Department will not allow discussion of the 800,000 cubic yards of sand trapped behind these walls.

It now denies the Nelsons a seawall because it would trap the 15,000 cubic yards of sand they own and because there is no EIR discussing the effects of sand trapping in Chatham.

The Nelsons cannot have a hearing on these issues because " . . . the Department does not have the authority to waive MEPA requirements." [Ex. 7, p. 2].

No hint of remorse, no glimmer of sympathy and, of course, no suggestion of reimbursement is to be found in the present Order.

The Nelson's have been fleeced. They no longer have the time or resources to do a proper EIR. The smooth cadence of the present order's regulatory recitals conceals a cruel cacophony of mismanagement, discrimination and violation of trust.

Under the *Wilson* case it is the obligation of the Department to provide the Nelsons a prompt hearing. This is particularly true where it has used the Nelsons' money to buy itself a custom tailored EIR while leaving the Nelsons naked and defenseless in the flood.

9) There is strong evidence that seawalls do not cause erosion. Under the *Lucas* case, the Department has the burden of showing how a seawall on the Nelson property will damage neighboring properties.

If the Department is not prepared to make this proof promptly, it should allow the Nelsons a wall.

Finally, it was pointed out to the Department some time ago that it had missed the deadline for issuing a Superseding Order in this case.

I am unaware of any subsequent request for a Superseding Order, much less the request for a denial mentioned in the Department's order.

If I am mistaken, please advise.

Absent such advice the Nelsons have the right to build a wall now.

I urge the Department to recognize that right and so bring an end to a struggle that is bad for everybody.

One wall added to the 31 built since 1987 cannot be that earth shaking. The Nelsons have paid a terrible price for it and the Department gets credit for an act of human decency. Please.

Sincerely,

/s/ Nick Soutter
Nick Soutter

TOWN OF CHATHAM
CONSERVATION COMMISSION

310 CMR 10.99 FORM 300
Form 3 LOGO Commonwealth
of Massachusetts

[SEAL]
DEP File No.

(To be provided by DEP)

City/Town Chatham

Applicant Lewis W. Hicks III

Notice of Intent
Under the
Massachusetts Wetlands Protection Act,
G.L. c. 131, § 40
and
Application for a Department of the Army Permit
and
Chatham Wetlands By-Law

Part I: General Information

1. Location: Street Address 40 Dune Drive Lot Number Lot 5 Plan Book 187 R. No. 1 Assessors Map 16A Lot 5C

2. Project: Type Revetmant Description Stone revetment proposed behind primary dune for "storm damage protection and flood control"

3. Registry: County Barnstable Current Book 1342 & Page 997

   Certificate (if Registered Land) _____

4. Applicant Lewis W. Hicks III Tel. (609) 896-0575 (508) 945-1959

   Address P.O. Box 6308, Lawrenceville, New Jersey 08648

5. Property Owner above Tel. _____

   Address _____

6. Representative E.A.S. Survey, Inc. Tel. 398-6813 (508) 888-3619

   Address 141 Rt 6A Salt Pond Bld., P.O. Box 1729, Sandwich, MA 02563

7. a. Ha[illegible] the Conservation Commission and the Department's Regional Office each been sent, by certified mail or hand delivery, 2 copies of completed Notice of Intent, with supporting plans and documents?

      Yes [X] No [ ]

   b. Has the fee been submitted?

      [X] Yes [ ] No

   c. Total Filing Fee Submitted $250.00

   d. City/Town Share of Filing Fee $137.50
      (sent to City/Town)
      State Share of Filing Fee $112.50
      (1/2 of fee in excess of $25, sent to DEP)

   e. Is a brief statement attached indicating how the applicant calculated the fee? [X] Yes [ ] No

8. Have all obtainable permits, variances and approvals required by local by-law been obtained?

   Yes [ ] No [X]

Obtained:	Applied For:	Not Applied For:
	Wetland By-Law	

9. Is any portion of the site subject to a Wetlands Restriction Order pursuant to G.L. c. 131, § 40A or G.L. c. 130, § 105? Yes [X] No [ ]

10. List all plans and supporting documents submitted with this Notice of Intent.

Identifying Number/Letter	Title, Date
Plan No. 92-2	"Revetment Plan" by EAS Survey Inc. motion 5-15-92

11. Check those resource areas within which work is PROPOSED:

(a) [X] Buffer Zone

(b) Inland:

[ ] Bank*
[ ] Bordering Vegetated Wetland*
[ ] Land Under Water Body & Waterway*

Land Subject to Flooding
[ ] Bordering
[ ] Isolated

(c) Coastal:

[ ] Land Under the Ocean*
[ ] Coastal Beach*
[ ] Barrier Beach
[ ] Rocky Intertidal Shore*
[ ] Land Under Salt Pond*
[ ] Fish Run*

[ ] Designated Port Area*
[X] Coastal Dune
[ ] Coastal Bank
[ ] Salt Marsh*
[ ] Land Containing Shellfish*

---

* Likely to involve U.S. Army Corps of Engineers concurrent jurisdictions. See General Instructions for Completing Notice of Intent.

* * *

I hereby certify under the pains and penalties of perjury that the foregoing Notice of Intent and accompanying plans, documents and supporting data are true and complete, to the best of my knowledge.

Signature of Applicant	Date
/s/ Edward A. Stone	5/15/92
EAS Survey, Inc.	Date
Signature of Applicant's Representative	

FORM MED 100 (TEST)
1 MAY 82

"Exception to ENG Form 4345 approved by HQUSACE, 6 May 1982".

"This document contains a joint Department of the Army and State of Massachusetts application for a permit to obtain permission to perform activities in United States waters. The Office of Management and Budget (OMB) has approved those questions required by the US Army Corps of Engineers. OMB Number 0702-0036 and expiration date of 30 September 1983 applies". This statement will be set in 6 point type.

TOWN OF CHATHAM

Conservation Commission

FINDINGS ON APPLICATION FOR PERMIT UNDER WETLANDS PROTECTION BY-LAW

FORM 505
FILE NUMBER
SE -10 1027

DATE OF ISSUANCE
July 2, 1992

APPLICANT: Lewis W. Hicks III

ADDRESS: P.O. Box 6038

Lawrenceville, NJ 08648

OWNER: _____

(If other than applicant)

ADDRESS: _____

LOCATION OF WORK: 40 Dune Drive, Chatham

After public hearing in accordance with open meeting law M.G.L. Ch. 39, s. 23B, closed on June 17, 1992, the Chatham Conservation Commission, in accordance with the Town of Chatham Wetlands By-Law finds:

[ ] Permit is granted – work may proceed;

[X] Permit is denied;

This project is denied for the following reasons:

1. The Commission finds the dunes seaward of the Hicks residence to be significant to stirm [sic] damage prevention and flood control.

2. The Commission has determined that the proposed construction of a stone revetment would affect the ability of the waves to remove sand from the dune and would interfere with the landward movement of

the dune. Therefore, the Commission has determined that the proposed stone revetment does not meet the performance standards for coastal dunes in ther [sic] Town of Chatham Wetlands Protection Regulations, 2.03,(3)(a), (b), (c), (d), (e).

3. The Commission has also determined that the proposed construction of a stone revetment would obstruct the movement of sediment and would have an averse [sic] effect on adjacent and down coast areas. Therefore, the Commission has determined that the proposed stone revetment, within a restricted dune (209R), pursuant to MGL Ch. 130, s.105, would not comply with 3(g), and 4(e) of said restrictions Act.

Conservation Commission:

/s/ John Geiger
/s/ Stuart Moore
/s/ Alice Hiscock
/s/ Illegible
/s/ Illegible

[LOGO] Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of
Environmental Protection
Southeast Regional Office

William F. Weld
Governor
Daniel S. Greenbaum
Commissioner

November 9, 1992

Nicholas B. Soutter, Esq.
Attorney at Law
One Washington Street
Wellesley, Massachusetts
02181

RE: CHATHAM–Wetlands
File No. SE 10-1027
Superseding Order of
Conditions – Denial

Dear Mr. Soutter:

Following an in-depth review of the above-referenced file and in accordance with Massachusetts General Laws, Chapter 131, Section 40, the Department of Environmental Protection has issued the enclosed Superseding Order of Conditions. This Order denies the project as proposed. The Department has determined that the project area is significant to the statutory interests of storm damage prevention and flood control.

The project proposes the construction of a stone revetment within a Coastal Dune (310 CMR 10.28). The proposed structure is similar to the previously proposed internally armored artificial dune that the Department denied on November 20, 1990, for the same property under Wetlands File No. SE 10-855.

The Department choose to waive an on-site inspection pursuant to 310 CMR 10.05 (7) (i) of the Wetlands Protection Act Regulations because said inspection would not of been necessary or useful to a proper and complete review of the proposed project.

The Department has determined that the proposed revetment would affect the ability of waves to remove sand from the dune and would interfere with the landward or lateral movement of the coastal dune. Therefore, the Department has found that the proposed revetment would not comply with the performance standards for Coastal Dunes at 310 CMR 10.28(3)(a) and (d).

Further, the Department has determined that the proposed project would fall within a restricted dune (209R) pursuant to M.G.L., Chapter 130, Section 105. The Department has determined that the proposed project would obstruct the movement of sediment and would adversely affect adjacent properties and downcoast areas. Therefore, the Department has found that the proposed project would not comply with 3 (G) and 4 (E) of said Restriction Order.

Please be advised that the Department would encourage you to consider the options of relocating the dwelling and/or placing the dwelling on an open pile foundation elevated above the FEMA-designated 100-year flood level. Furthermore, the Department would advise you to reconsider the focus of coastal erosion abatement at this site away from structural solutions and towards non-structural ones, as per 310 CMR 10.27(5). Non-structural approaches (so-called "soft engineering") would include beach and dune nourishment and dune enhancement

through the utilization of sandtrapping devices and vegetation. Nourishment can be an effective means of retarding coastal beach and dune loss and affording protection to nearby buildings and/or structures.

Please be reminded that the proposed project exceeds the wetland threshold as found in 301 CMR 11.26(7) (a) 2b of the MEPA Regulations. In the event the enclosed Superseding Order of Conditions is appealed, the Department will require the completion of the MEPA review process in accordance with 310 CMR 10.07 of the Wetlands Protection Act Regulations before issuing a Final Order of Conditions. The Department believes that the MEPA review process offers the opportunity for a comprehensive evaluation of various long-term alternatives for shoreline protection and would encourage you to participate in that process.

Please be advised that if an emergency condition develops that imminently threatens the dwelling, the applicant may request an emergency certification from the Conservation Commission or the Department for beach nourishment and/or the temporary placement of sand bags (recommended maximum size should not exceed 100 pound bags). An emergency certification is intended to abate the emergency until such time as all necessary permits may be obtained for a more permanent solution.

In the opinion of the Department, the reasons given here are sufficient to justify this Superseding Order of Conditions. However, the Department reserves the right, should there be further proceedings in this matter, to

raise additional issues and present further evidence as may be appropriate.

Very truly yours,

/s/ Elizabeth A. Kouloheras
Elizabeth A. Kouloheras,
Chief
Wetlands Section

K/JM/bh

cc: Chatham Conservation Commission
549 Main St.
Chatham, MA 02633

[Logo]

THE COMMONWEALTH OF MASSACHUSETTS

Executive Office of Environmental Affairs

100 Cambridge Street, Boston, 02202

WILLIAM F. WELD
GOVERNOR

ARGEO PAUL CELLUCCI
LIEUTENANT GOVERNOR

TRUDY COXE
SECRETARY

Tel: (617) 727-9800
Fax: (617) 727-2754

September 30, 1993

CERTIFICATE OF THE SECRETARY OF
ENVIRONMENTAL AFFAIRS ON THE
FINAL ENVIRONMENTAL IMPACT REPORT

PROJECT NAME	:	Breach Project, Phase I
PROJECT LOCATION	:	Chatham
EOEA NUMBER	:	7345
PROJECT PROPONENT	:	Chatham Coastal Erosion Advisory Comm.
DATE NOTICED IN MONITOR	:	August 24, 1993

The Secretary of Environmental Affairs herein issues a statement that the Final Environmental Impact Report submitted on the above project adequately and properly complies with the Massachusetts Environmental Policy Act (G. L., c. 30, s. 61-62H) and with its implementing regulations (301 CMR 11.00).

The breach project is an attempt to protect developed areas in Chatham from the damaging wave climate resulting from the 1987 breach of the Nauset Barrier Beach. The project has been divided into two phases for purposes of

environmental impact review. The Phase I EIR addresses the issues of revetment construction on properties from Aunt Lydia's Cove to the Beach and Tennis Club. A future Phase II EIR will address the environmental issues resulting from efforts to protect properties south of the Beach and Tennis Club to Morris Island. The Phase II area consists of dune fields whereas most of Phase I involves construction of protective structures on coastal banks.

The majority of property owners in the Phase I area have constructed some protective structures under emergency authorizations of this office and DEP. Thus, the focus of the Phase I EIR has been to identify any impacts that have been caused by the structures and to propose mitigation for those impacts. Following the appeal period for this decision, state agencies can issue normal (i.e., non-emergency) permits properly conditioned to minimize the potential impacts documented in the EIR.

The FEIR has also evaluated the environmental impacts of additional efforts which may be necessary to assure the integrity of the coastal revetments and the environmental impacts of enhancing the dunes on two unarmored segments.

The FEIR has expanded and clarified the mitigation commitments of the proponents. Comments have been received that question the ability to ensure that public access will be provided for as mitigation for the beach nourishment to be undertaken by the Town. I request that the permitting agencies require mitigation commitments in the form of public access easements prior to issuance of the state approvals.

Another concern is the longterm loss of public access to the intertidal area. The FEIR proposes that the trigger point for beach nourishment be the movement of the breach to a point opposite the marina. If that is an appropriate distance to be nourishing the beach at the Beach and Tennis Club, it would appear desirable to begin the nourishment of northern areas when a comparable distance becomes available. Since nourishment sand is available on a frequent basis, the total renourishment can be spread over a number of dredging contracts over a number of years, and some of the beach and intertidal areas could be restored in less than 20 to 40 years. Even if some of the nourishment sand is lost to erosion during the project, adequate replacement material is probably available from dredging projects which otherwise must find a disposal site for each dredging effort.

I assume that the dune enhancement will be on-going so as to counteract coastal erosion and maintain adequate storm damage protection.

The conclusions of this FEIR are valid for the next 5 years, and probably longer if a continuing project ensues. If proposals are developed for activities which were not evaluated in this EIR, proponents must submit a notice of project change to my office. Proposals to add further protection already evaluated in the EIR must be submitted only to the permitting agencies. The agencies can act based on the Section 61 Findings prepared in connection with this EIR.

The EIR is also serving as a report of a project of regional significance for the Cape Cod Commission. As

such I understand that a hearing will be held shortly to complete the review by the Commission.

September 30, 1993 /s/ Trudy Cose, Secretary
Date Trudy Coxe, Secretary

Comments received: CCC - 9/23/93
MCZM - 9/24/93
N Soutter -- 9/21/93

TC/DES/ds

[Logo]

THE COMMONWEALTH OF MASSACHUSETTS

Executive Office of Environmental Affairs

100 Cambridge Street, Boston, 02202

WILLIAM F. WELD
GOVERNOR

ARGEO PAUL CELLUCCI
LIEUTENANT GOVERNOR

TRUDY COXE
SECRETARY

Tel: (617) 727-9800
Fax: (617) 727-2754

June 30, 1994

CERTIFICATE OF THE SECRETARY OF ENVIRONMENTAL AFFAIRS ON THE FINAL ENVIRONMENTAL IMPACT REPORT

PROJECT NAME	:	Nelson Artificial Dune/ Breach Project
PROJECT LOCATION	:	Chatham
EOEA NUMBER	:	8133/7345
PROJECT PROPONENT	:	Alfred B. Nelson/ Chatham Coastal Erosion Advisory Committee
DATE NOTICED IN MONITOR	:	May 24, 1994

The Secretary of Environmental Affairs herein issues a statement that the Final Environmental Impact Report submitted on the above project adequately and properly complies with the Massachusetts Environmental Policy Act (G. L., c. 30, s. 61-62H) and with its implementing regulations (301 CMR 11.00).

The project represents Phase II of the armoring of coastal bank between the Chatham Fish Pier and Morris Island. A Final EIR for Phase I, which addressed properties between the Fish Pier and the Tennis Club, was determined to be adequate on September 30, 1993. Phase II addresses armoring and other shorefront protection measures between the Tennis Club and Morris Island.

The Department of Environmental Protection (DEP) must act on adjudicatory appeals for coastal structures proposed by several property owners in the Phase II area. The remaining property owners must apply to the Chatham Conservation Commission for approval to construct coastal structures. DEP waterways licenses may be required in the future as well. Section 61 Findings must be prepared and accompany DEP permit actions on the proposals.

I strongly encourage the Town to develop a plan to implement the project as one continuous structure involving each segment.

The project is also being reviewed as a Development of Regional Impact and, as such, requires approval by the Cape Cod Commission (CCC). Joint review between MEPA and the CCC has occurred. A final hearing will be required by the CCC.

I find the analysis provided in the FEIR adequate for purposes of letting the project proceed to the necessary regulatory decisions. Outstanding issues, including the possibility that a variance may be needed, raised by the CCC and the Coastal Zone Management office can be properly addressed in the adjudicatory proceeding and other regulatory processes.

I note that proposals for the Brontas and Blank properties were reviewed under separate MEPA filings, EOEA #8125/8126. An EIR was completed and certified adequate on November 14, 1991.

June 30, 1994 /s/ Trudy Coxe
Date Trudy Coxe

Comments received: MCZM - 6/28/94
CCC - 6/23/94
D DOE - 5/13/94

TC/DES/ds

Massachusetts General Laws,

Chapter 131, Section 40

* * *

§ 40. Removal, fill, dredging or altering of land bordering waters

No person shall remove, fill, dredge or alter any bank, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding, other than in the course of maintaining, repairing or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, water, telephone, telegraph and other telecommunication services, without filing written notice of his intention to so remove, fill, dredge or alter, including such plans as may be necessary to describe such proposed activity and its effect on the environment and without receiving and complying with an order of conditions and provided all appeal periods have elapsed. Said notice shall be filed by delivery in hand to the conservation commission or its authorized representative or by certified mail, return receipt requested, to said commission, or, if none, to the board of selectmen in a town or the mayor of a city in which the proposed activity is to be located. Upon such filing, the receipt of such notice shall be acknowledged in writing on the face thereof and shall include the time and date so received. A person delivering said notice by hand shall be given a receipt in writing acknowledging the time and

date of such filing. Copies of such notice shall be sent at the same time by certified mail to the department of environmental protection. To defray state and local administrative costs each person filing such a notice shall pay a filing fee, determined on a sliding scale basis by the commissioner of administration after consultation with the secretary of environmental affairs. Fifty percent of any filing fee in excess of twenty-five dollars shall be made payable to the department of environmental protection, in a manner to be determined by the commissioner of environmental protection, at the same time as the copies of the notice are sent to the department of environmental protection. The remainder of said fee shall be made payable to the city or town; provided, that said remainder shall be expended solely by the local conservation commission for the performance of its duties under this chapter and shall accompany the copy of the notice sent to the city or town. No such notice shall be sent before all permits, variances, and approvals required by local by-law with respect to the proposed activity, which are obtainable at the time of such notice, have been obtained, except that such notice may be sent, at the option of the applicant, after the filing of an application or applications for said permits, variances, and approvals; provided, that such notice shall include any information submitted in connection with such permits, variances, and approvals which is necessary to describe the effect of the proposed activity on the environment. Upon receipt of any notice hereunder the department of environmental protection, hereinafter called the department, shall designate a file number for such notice and shall send a notification of such number to the person

giving notice to the conservation commission, selectmen or mayor to whom the notice was given. Said notification shall state the name of the owner of the land upon which the proposed work is to be done and the location of said land.

Any person filing a notice of intention with a conservation commission shall at the same time give written notification thereof, by delivery in hand or certified mail, return receipt requested, to all abutters within one-hundred feet of the property line of the land where the activity is proposed, at the mailing addresses shown on the most recent applicable tax list of the assessors, including, but not limited to, owners of land directly opposite said proposed activity on any public or private street or way, and in another municipality or across a body of water. Said notification shall be at the applicant's expense, and shall state where copies of the notice of intention may be examined and obtained and where information regarding the date, time and place of the public hearing may be obtained. Proof of such notification, with a copy of the notice mailed or delivered, shall be filed with the conservation commission.

Within twenty-one days of the receipt by a conservation commission of a written request made by any person and sent by certified mail, said commission shall make a written determination as to whether this section is applicable to any land or work thereon. When such person is other than the owner, notice of any such determination shall also be sent to the owner.

The term "applicant" as used in this section shall mean the person giving notice of intention to remove, fill, dredge or alter.

The term "person" as used in this section shall include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or political subdivision thereof, administrative agency, public or quasipublic corporation or body, or any other legal entity or its legal representative, agents or assigns.

The term "bogs" as used in this section shall mean areas where standing or slowly running water is near or at the surface during a normal growing season and where a vegetational community has a significant portion of the ground or water surface covered with sphagnum moss (*Sphagnum*) and where the vegetational community is made up of a significant portion of one or more of, but not limited to nor necessarily including all, of the following plants or groups of plants: aster (*Aster nemoralis*), azaleas (*Rhododendron canadense* and *R. viscosum*), black spruce (*Picea mariana*), bog cotton (*Eriophorum*), cranberry (*Vaccinium macrocarpon*), high-bush blueberry (*Vaccinium corymbosum*), larch (*Larix laricina*), laurels (*Kalmia angustifolia* and *K. polifolia*), Leatherleaf (*Chamaedaphne calyculata*), orchids (*Arethusa, Calopogon, Pogonia*), pitcher plants (*Sarracenia purpurea*), sedges (*Cyperaceae*), sundews (*Droseraccae*), sweet gale (*Myrica gale*), white cedar (*Chamaecyparis thyoides*).

The term "coastal wetlands", as used in this section, shall mean any bank, marsh, swamp, meadow, flat or

other lowland subject to tidal action or coastal storm flowage.

The term "freshwater wetlands", as used in this section, shall mean wet meadows, marshes, swamps, bogs, areas where groundwater, flowing or standing surface water or ice provide a significant part of the supporting substrate for a plant community for at least five months of the year; emergent and submergent plant communities in inland waters; that portion of any bank which touches any inland waters.

The term "swamps", as used in this section, shall mean areas where ground water is at or near the surface of the ground for a significant part of the growing season or where runoff water from surface drainage frequently collects above the soil surface, and where a significant part of the vegetational community is made up of, but not limited to nor necessarily include all of the following plants or groups of plants: alders (*Alnus*), ashes (*Fraxinus*), azaleas (*Rhododendron canadense* and *R. viscosum*), black alder (*Ilex verticillata*), black spruce (*Picea mariana*), button bush (*Cephalanthus occidentalis*), American or white elm (*Ulmus americana*), white Hellebore (*Veratrum viride*), hemlock (*Tsuga canadensis*), highbush blueberry (*Vaccinium corymbosum*), larch (*Larix laricina*), cowslip (*Caltha palustris*), poison sumac (*Toxicodendron vernix*), red maple (*Acer rubrum*), skunk cabbage (*Symplocorpus foetidus*), sphagnum mosses (*Sphagnum*), spicebush (*Lindera benzoin*), black gum tupelo (*Nyssa sylvatica*), sweet pepper bush (*Clethra alnifolia*), white cedar (*Chamaecyparis thyoides*), willow (*Salicaceae*).

The term "wet meadows", as used in this section where ground water is at the surface for a significant part of the growing season and near the surface throughout the year and where a significant part of the vegetational community is composed of various grasses, sedges and rushes; made up of, but not limited to nor necessarily including all, of the following plants or groups of plants: blue flag (*Iris*), vervain (*Verbena*), thoroughwort (*Eupatorium*), dock (*Rumex*), false loosestrife (*Ludwigia*), hydrophilic grasses (*Gramincae*), loose-strife (*Lythrum*), marsh fern (*Dryopteris thelypteris*), rushes (*Juncaceae*), sedges (*Cyperaceae*), sensitive fern (*Onoclea sensibilis*), smartweed (*Polygonum*).

The term "marshes", as used in this section, shall mean areas where a vegetational community exists in standing or running water during the growing season and where a significant part of the vegetational community is composed of, but not limited to nor necessarily including all, of the following plants or groups of plants: arums (*Aracea*), bladder worts (*Utricularia*), bur reeds (*Sparganiacea*), button bush (*Cehphalanthus occidentalis*), cattails (*Typha*), duck weeds (*Lemnaceae*), eelgrass (*Vallisneria*), frog bits (*Hydrocharitaceae*), horsetails (*Equisetaceae*), hydrophilic grasses (*Gramineae*), leatherleaf (*Chamaedaphne calyculata*), pickerel weeds (*Pontederiacea*), pipeworts (*Eriocaulon*), pond weeds (*Potamogeton*), rushes (*Juncaceae*), sedges (*Cyperaceae*), smartweeds (*Polygonum*), sweet gale (*Myrica gale*) water milfoil (*Halcragaceae*), water lilies (*Nymphaeaceae*), water starworts (*Callitrichaceae*), water willow (*Decodon verticillatus*).

The conservation commission, selectmen or mayor receiving notice under this section shall hold a public

hearing on the proposed activity within twenty-one days of the receipt of said notice. Notice of the time and place of said hearing shall be given by the hearing authority at the expense of the applicant, not less than five days prior to such hearing, by publication in a newspaper of general circulation in the city or town where the activity is proposed and by mailing a notice to the applicant and to the board of health and the planning board of said city or town. The conservation commission and its agents, officers and employees and the commissioner of environmental protection and his agents and employees, may enter upon privately owned land for the purpose of performing their duties under this section. No conditions shall be imposed, nor shall any determination be rendered by a conservation commission, in reference to this section, unless the conservation commission meets with a quorum present.

If after said hearing the conservation commission, selectmen or mayor, as the case may be, determine that the area on which the proposed work is to be done is significant to public or private water supply, to the groundwater supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish, to the protection of wildlife habitat or to the protection of fisheries, such conservation commission, board of selectmen or mayor shall by written order within twenty-one days of such hearing impose such conditions as will contribute to the protection of the interests described herein, and all work shall be done in accordance therewith. If the conservation commission, selectmen or mayor, as the case may be, make a determination that the proposed activity does not require the

imposition of such conditions, the applicant shall be notified of such determination within twenty-one days after said hearing. Such order or notification shall be signed by the mayor or a majority of the conservation commission or board of selectmen, as the case may be, and a copy thereof shall be sent forthwith to the applicant and to the department.

If a conservation commission has failed to hold a hearing within the twenty-one day period as required, or if a commission, after holding such a hearing has failed within twenty-one days therefrom to issue an order, or if a commission, upon a written request by any person to determine whether this section is applicable to any work, fails within twenty-one days to make said determination, or where an order does issue from said commission, the applicant, any person aggrieved by said commission's order or failure to act, or any owner of land abutting the land upon which the proposed work is to be done, or any ten residents of the city or town in which said land is located, may, by certified mail and within ten days from said commission's order or failure to act, request the department of environmental protection to determine whether the area on which the proposed work is to be done is significant to public or private water supply, to the groundwater supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish, to the protection of wildlife habitat or to the protection of fisheries. The commissioner of environmental protection or his designee also may request such a determination within said ten days. The party making any such request shall at the same time send a copy thereof by certified mail to the conservation

commission, board of selectmen or mayor which conducted the hearing hereunder. If such party is other than the applicant, a copy of such request shall also be sent at the same time by certified mail to the applicant. Upon receipt of such request the department shall make the determination requested and shall by written order issued within seventy days of receipt of such request and signed by the commissioner or his designee, impose such conditions as will contribute to the protection of the interests described herein; provided, however, that said department shall notify the applicant within thirty days of the receipt of such request if his application or request is not in proper form or is lacking information or documentation necessary to make the determination. Such order shall supersede the prior order of the conservation commission, board of selectmen or mayor, and all work shall be done in accordance therewith, but in no event shall any work commence until ten days have elapsed following the issuance of said order. At any time prior to a final order of determination by the department, any party requesting a determination may in writing withdraw the request, and such withdrawal shall be effective upon receipt by the department. Notwithstanding the withdrawal, the commissioner or his designee may continue the determination if he notifies all parties within ten days of receipt of the withdrawal. A copy of such order shall be sent to the applicant, to the conservation commission, board of selectmen or mayor which conducted the hearing hereunder. As used in this section the words "wildlife habititat" shall mean those areas subject

to this section which, due to their plant community composition and structure, hydrologic regime or other characteristics, provide important food, shelter, migratory or overwintering areas, or breeding areas for wildlife.

No work proposed in any notice of intention shall be undertaken until the final order, determination or notification with respect to such work has been recorded in the registry of deeds, or if the land affected thereby be registered land, in the registry section of the land court for the district wherein the land lies. If the final order, determination or notification requires the recording of a plan which (1) shows the location of the work, (2) is prepared by a registered professional engineer or land surveyor and (3) is in recordable form, no work proposed in the notice of intention shall be undertaken until such plan has been recorded in the registry of deeds or, if the land affected thereby is registered land, in the registry section of the land court for the district wherein such land lies.

Within twenty-one days of the receipt of a written request, by the applicant or the owner of the property, for a certificate of compliance, the issuer of the final order shall grant such request if the activity, or portions thereof, complies with such final order. The certificate of compliance shall state that the activity, or portions thereof, has been completed in accordance with such order.

Any site where work is being done which is subject to this section shall display a sign of not less than two square feet or more than three square feet bearing the words, "Massachusetts Department of Environmental

Protection File Number. . . . " and the sign shall display the file number assigned to the project.

If the department of environmental protection finds that any proposed work would violate the provisions of chapter ninety-one, it shall proceed immediately to enforce the provisions of said chapter.

The provisions of this section shall not apply to any mosquito control work done under the provisions of clause (36) of section five of chapter forty, of chapter two hundred and fifty-two or on any special act; to maintenance of drainage and flooding systems of cranberry bogs, to work performed for normal maintenance or improvement of land in agricultural use or in aquacultural use; or to any project authorized by special act prior to January first, nineteen hundred and seventy-three.

Within one hundred and twenty days of the effective date of this act, the department, upon the advice and consent of the Commissioner of the Department of Food and Agriculture, shall promulgate rules and regulations pursuant to this section which shall establish definitions for the term "normal maintenance or improvement of land in agricultural, or in aquacultural use", for each agricultural commodity, or where appropriate because of similarities in cultural practices, groups or commodities in the Commonwealth. The department shall create a farmland advisory board to be appointed by the commissioner consisting of five persons one a member of the cooperative extension service, one a member of the USDA soil conservation service, one a member of a municipal

conservation commission who has demonstrated expertise in agricultural issues, and two commercial farmers with expertise in different agricultural commodities to assist the department in the drafting of rules and regulations pursuant to this paragraph.

The notice of intention required in the first paragraph of this section shall not apply to emergency projects necessary for the protection of the health or safety of the commonwealth which are to be performed or which are ordered to be performed by an agency of the commonwealth or a political subdivision thereof. An emergency project shall mean any project certified to be an emergency by the conservation commission of the city or town in which the project would be undertaken, or if none, by the mayor or said city or the selectmen of said town. If the conservation commission, mayor, or selectmen, as the case may be, fail to act favorably within twenty-four hours of receipt of a request for certification of an emergency project, said project may be so certified by the commissioner or his designee. In no case shall any removal, filling, dredging, or alteration authorized by such certification extend beyond the time necessary to abate the emergency.

Notwithstanding the provisions of section fourteen of chapter twenty-one A or any other provision of law to the contrary, the notice of intention required in the first paragraph of this section shall not apply to a maintenance dredging project for which a license has been previously issued within ten years by the division of waterways of the department of environmental protection. A person intending to fill or dredge under such previously issued license shall file a written notice by certified mail to the

conservation commission or if none, to the board of selectmen in a town or mayor of a city in which the land upon which such dredging project is located. Such notice shall contain in the name and address of the applicant.

If the conservation commission, the board of selectmen or mayor fails to notify the applicant at the applicant's address within twenty days of the receipt of such notice of the specific objections to the commencement of such dredging fill or maintenance dredging contemplated under said license, the applicant may commence such work without any further notice to other agencies of the commonwealth. Notwithstanding failure to notify an applicant, as hereinbefore provided, the conservation commission, the board of selectmen or mayor may at any time designate an area at which spoilage from the dredging may be placed and may require the relocation of shellfish before such maintenance dredging takes place.

If the conservation commission, the board of selectmen or mayor cites specific objections to the notice of intention, such conservation commission, board of selectmen or mayor may order a hearing as provided in this section and all other pertinent provisions of this section shall apply.

Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced

within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person. Any court having equity jurisdiction may restrain, a violation of this section and enter such orders as it deems necessary to remedy such violation, upon the petition of the attorney general, the commissioner, a city or town, an owner or occupant of property which

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The Commonwealth of Massachusetts

SECRETARY OF STATE

REGULATION FILING AND PUBLICATION

1. Regulation Chapter Number and Heading:

   310 CMR 10.00

2. Name of Agency:

   Department of Environmental Protection

3. This document is reprinted from the Code of Massachusetts Regulations and contains the following:

310 CMR 10.00	PART I:	Regulations for All Wetlands
	PART II:	Additional Wetlands for Coastal Wetlands
	PART III:	Additional Wetlands for Inland Wetlands

Under the provisions of Massachusetts General Laws, Chapter 30A, Section 6 and Chapter 233, Section 75, this document may be used as evidence of the original documents on file with the State Secretary.

Compiled as in full force and effect: 1/1/94

A true copy attest:

/s/ Michael J. Connolly
MICHAEL JOSEPH CONNOLLY
Secretary of State

310 CMR 10.00: WETLANDS PROTECTION

PART I: REGULATIONS FOR ALL WETLANDS

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10.02: Statement of Jurisdiction
10.03: General Provisions
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Protection of Wildlife Habitat: 1987
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1983 Regulatory Revisions
Fees: 1989
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Maintenance and Improvement of Land in Agricultural Use: 1993

PART I: REGULATIONS FOR ALL WETLANDS

10.01: Introduction and Purposes

(1) Introduction. 310 CMR 10.00 is promulgated by the Commissioner of the Massachusetts Department of Environmental Protection pursuant to the authority granted to him under M.G.L. c. 131, s. 40 (The Wetlands Protection Act, hereinafter referred to as the Act), 310 CMR 10.00 shall complement M.G.L. c. 131, s. 40, and shall have the force of law upon their effective date.

The regulations contained in Part I of 310 CMR 10.00 provide definitions and procedures. Part I of 310 CMR 10.00 pertains to both inland and coastal areas subject to protection under M.G.L. c. 131, s. 40. The regulations contained in Part II and III of 310 CMR 10.00 provide standards for work within those areas. Part II, 310 CMR 10.00 pertains only to coastal areas and Part III of 310 CMR 10.00 pertains only to inland areas. A project may be subject to regulation under Parts I, II and III of 310 CMR 10.00 in which case compliance with *all* applicable regulations is required.

(2) Purpose The Act sets forth a public review and decision-making process by which activities affecting Areas Subject to Protection Under M.G.L. c. 131, s. 40 are to be regulated in order to contribute to the following interests:

- protection of public and private water supply
- protection of ground water supply
- flood control
- storm damage prevention
- prevention of pollution

- protection of land containing shellfish
- protection of fisheries
- protection of wildlife habitat

The purpose of 310 CMR 10.00 is to define and clarify that process by establishing standard definitions and uniform procedures by which conservation commissions and the Department may carry out their responsibilities under M.G.L. c. 131, s. 40.

310 CMR 10.00 is intended solely for use in administering M.G.L. c. 131, s. 40; nothing contained herein should be construed as preempting or precluding more stringent protection of wetlands or other natural resource areas by local by-law, ordinance or regulation.

* * *

10.03: General Provisions

(1) Burden of Proof.

(a) Any person who files a Notice of Intent to perform any work within an Area Subject to Protection Under the Act or within the Buffer Zone has the burden of demonstrating to the issuing authority:

1. that the area is not significant to the protection of any of the interests identified in the Act; or

2. that the proposed work will contribute to the protection of the interests identified in the Act by complying with the general performance standards established by 310 CMR 10.00 for that area.

(b) Any person who requests the issuing authority to regulate work taking place outside an Area Subject to Protection Under the Act and outside the Buffer Zone has the burden of demonstrating to the satisfaction of the issuing authority that the work has in fact altered an Area Subject to Protection Under the Act.

(2) Burden of Going Forward. The burden of going forward means having to produce at least some credible evidence from a competent source in support of the position taken. This burden shall be upon the person contesting the Department's position when the Department has been requested to hold an adjudicatory hearing. In the event that under the provisions of 310 CMR 10.03 two (2) or more persons have the burden of going forward, said burden may be placed on all or any number of them, in the discretion of the hearing officer.

* * *

10.04: Definitions

* * *

Significant means plays a role. A resource area is significant to an interest identified in M.G.L. c. 131, s. 40 when it plays a role in the provision or protection, as appropriate of that interest.

* * *

10.06: Emergencies

(1) Any person requesting permission to do an emergency project shall specify why the project

is necessary for the protection of the health or safety of the citizens of the Commonwealth and what agency of the Commonwealth or subdivision thereof is to perform the project or has ordered the project to be performed. If the project is certified to be an emergency by the conservation commission or the Commissioner, the certification shall include a description of the work which is to be allowed and shall not include work beyond that necessary to abate the emergency. A site inspection shall be made prior to certification.

(2) An emergency certification shall be issued only for the protection of public health or safety.

(3) The time limitation for performance of emergency work shall not exceed 30 days, or 60 days for Immediate Response Actions approved by the Bureau of Waste Site Cleanup (BWSC) of the Department of Environmental Protection in accordance with the provisions of 310 CMR 40.0410, unless written approval of the Commissioner is obtained.

(4) A copy of an emergency certification shall be sent to the Department when it is issued by a conservation commission, and to the conservation commission when it is issued by the Department.

(5) The Department may, on its own motion or at the request of any person, review: an emergency certification issued by a conservation commission and any work permitted thereunder; a denial by a conservation commission of a request for emergency certification; or the failure by a conservation commission to act within 24 hours of a request for emergency certification. Such review shall not operate to stay the

work permitted by the emergency certification unless the Department specifically so orders. The Department's review shall be conducted within seven days of: issuance by a conservation commission of the emergency certification; denial by a conservation commission of the emergency certification; or failure by a conservation commission to act within 24 hours of a request for emergency certification. If certification was improperly granted, or the work allowed thereunder is excessive or not required to protect the health and safety of citizens of the Commonwealth, the Department may revoke the emergency certification, condition the work permitted thereunder, or take such other action as it deems appropriate.

* * *

10.26: Designated Port Areas

(1) Preamble. Land under the ocean in designated port areas is likely to be significant to marine fisheries, storm damage prevention and flood control. In designated port areas, salt marshes, coastal dunes, land under salt ponds, coastal beaches, tidal flats, barrier beaches, rocky intertidal shores and land containing shellfish are not likely to be significant to marine fisheries, storm damage prevention or flood control.

Many species of marine fisheries, including anadromous fish, may inhabit port areas. Anadromous fish may need to be able to pass through port areas to inland spawning areas or to the sea. Other species frequently feed in designated port areas due to high nutrient concentrations in the waters and the tidelands.

Designated port areas, which are portions of developed harbors, are usually located in estuaries. Relatively high concentrations of contaminants, from vessel discharges and point and non-point source discharges, are likely to occur in port areas. Water circulation patterns tend to distribute pollution throughout the estuary, and to other areas which are likely to be significant to other interests of M.G.L. c. 131, s. 40. Land forms in designated port areas have been greatly altered from their natural shape, and coastal engineering structures often have replaced natural protection for upland areas from storm damage and flooding.

Land under the ocean often provides support for such structures. Some proposed activities may alter wave and current patterns so as to affect the stability of such structures or the depths or configurations of navigation channels.

Where a proposed project involves dredging, filling, removing, or altering land under the ocean in designated port areas, the issuing authority shall presume that the area is significant to marine fisheries, storm damage prevention and flood control. These presumptions may be overcome only upon a clear showing that land under the ocean in designated port areas does not play a role in the protection of marine fisheries, storm damage prevention or flood control, or that a salt marsh, coastal dune, land under a salt pond, coastal beach, tidal flat, barrier beach, rocky intertidal shore or land containing shellfish, in designated port areas, does play a role in marine fisheries, storm damage prevention or flood control, and if the issuing

authority makes a written determination to such effect.

When a proposed project in a designated port area is on land under the ocean which is determined to be significant to marine fisheries, the following factors are critical to the protection of such interests:

(a) water circulation, and

(b) water qaulity [sic].

When a proposed project in a designated port area is on land under the ocean which is determined to be significant to storm damage prevention or flood control, the ability of such land to provide support for adjacent coastal or man-made structures is critical to the protection of such interests.

(2) Definition Designated Port Areas means those areas designated in 310 CMR 9.24(2) and 9.24(3) of the Department adopted pursuant to the Waterways law, M.G.L. c. 91.

WHEN LAND UNDER THE OCEAN IN DESIGNATED PORT AREAS IS FOUND TO BE SIGNIFICANT TO THE PROTECTION OF MARINE FISHERIES, STORM DAMAGE PREVENTION OR FLOOD CONTROL, THE FOLLOWING REGULATIONS SHALL APPLY:

(3) Projects shall be designated and constructed, using best practical measures, so as to minimize adverse effects on marine fisheries caused by changes in:

(a) water circulation;

(b) water quality, including, but not limited to, other than natural fluctuations in

the level of dissolved oxygen, temperature or turbidity, or the addition of pollutants.

(4) Projects shall be designed and constructed, using the best practical measures, so as to minimize adverse effects on storm damage prevention or flood control caused by changes in such land's ability to provide support for adjacent coastal banks or adjacent coastal engineering structures.

10.27: Coastal Beaches

(1) Preamble. Coastal beaches, which are defined to include flats, are significant to storm damage prevention, flood control and the protection of wildlife habitat. In addition, tidal flats are likely to be significant to the protection of marine fisheries and where there are shellfish, to land containing shellfish.*

Coastal beaches dissipate wave energy by their gentle slope, their permeability and their granular nature, which permit changes in beach form in response to changes in wave conditions.

Coastal beaches serve as a sediment source for dunes and subtidal areas. Steep storm waves cause beach sediment to move offshore, resulting in a gentler beach slope and greater energy dissipation. Less steep waves cause an onshore return of beach sediment, where it will be available to provide protection against future storm waves.

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*For regulations concerning land containing shellfish see 310 CMR 10.34.

A coastal beach at any point serves as a sediment source for coastal areas downdrift from that point. The oblique approach of waves moves beach sediment alongshore in the general direction of wave action. Thus, the coastal beach is a body of sediment which is moving along the shore.

Coastal beaches serve the purposes of storm damage prevention and flood control by dissipating wave energy, by reducing the height of storm waves, and by providing sediment to supply other coastal features, including coastal dunes, land under the ocean and other coastal beaches. Interruptions of these natural processes by man-made structures reduce the ability of the coastal beach to perform these functions.

A number of birds also nest in the coastal berm, between the toe of a dune and the high tide line. In addition, isolated coastal beaches on small islands are important as haul out areas for harbor seals.

Tidal flats are likely to be significant to the protection of marine fisheries and wildlife habitat because they provide habitats for marine organisms such as polychaete worms and mollusks, which in turn are food sources for fisheries and migratory and wintering birds. Coastal beaches are extremely important in recycling of nutrients derived from storm drift and tidal action. Vegetative debris along the drift line is vital for resident and migratory shorebirds, which feed largely on invertebrates which eat the vegetation. Below the drift line in the lower intertidal zone are infauna (invertebrates such as mollusks and crustacea) which are also eaten by shore birds.

Tidal flats are also sites where organic and inorganic materials may become entrapped and then returned to the photosynthetic zone of the water column to support algae and other primary producers of the marine food web.

When a proposed project involves the dredging, filling, removing, or altering of a coastal beach, the issuing authority shall presume that the coastal beach is significant to the interests specified above. This presumption may be overcome only upon a clear showing that a coastal beach does not play a role in storm damage prevention, flood control, or protection of wildlife habitat, or that tidal flats do not play a role in the protection of marine fisheries or land containing shellfish, and if the issuing authority makes a written determination to such effect.

When coastal beaches are determined to be significant to storm damage prevention or flood control, the following characteristics are critical to the protection of those interests:

(a) volume (quantity of sediments) and form, and

(b) the ability to respond to wave action.

When coastal beaches are significant to the protection of marine fisheries or wildlife habitat, the following characteristics are critical to the protection of those interests:

(a) distribution of sediment grain size,

(b) water circulation

(c) water quality, and

(d) relief and elevation.

When tidal flats are in a designated port area. 310 CMR 10.26(1) through 10.26(4) shall apply. When tidal flats are significant to land containing shellfish, 310 CMR 10.34(1) through 10.34(8) shall apply.

(2) Definitions.

(a) Coastal Beach means unconsolidated sediment subject to wave, tidal and coastal storm action which forms the gently sloping shore of a body of salt water and includes tidal flats. Coastal beaches extend from the mean low water line landward to the dune line, coastal bankline or the seaward edge of existing man-made structures, when these structures replace one of the above lines, whichever is closest to the ocean.

(b) "Tidal flat" means any nearly level part of a coastal beach which usually extends from the mean low water line landward to the more steeply sloping face of the coastal beach or which may be separated from the beach by land under the ocean.

WHEN A COASTAL BEACH IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION, FLOOD CONTROL, OR PROTECTION OF WILDLIFE HABITAT, THE FOLLOWING REGULATIONS SHALL APPLY:

(3) Any project on a coastal beach, except any project permitted under 310 CMR 10.30(3)(a), shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any coastal beach or an adjacent or downdrift coastal beach.

(4) Any groin, jetty, solid pier, or other such solid fill structure which will interfere with littoral drift, in addition to complying with 310 CMR 10.27(3), shall be constructed as follows:

(a) It shall be the minimum length and height demonstrated to be necessary to maintain beach form and volume. In evaluating necessity, coastal engineering, physical oceanographic and/or coastal geologic information shall be considered.

(b) Immediately after construction any groin shall be filled to entrapment capacity in height and length with sediment of grain size compatible with that of the adjacent beach.

(c) Jetties trapping littoral drift material shall contain a sand by-pass system to transfer sediments to the downdrift side of the inlet or shall be periodically redredged to provide beach nourishment to ensure that downdrift or adjacent beaches are not starved of sediments.

(5) Notwithstanding 310 CMR 10.27(3), beach nourishment with clean sediment of a grain size compatible with that on the existing beach may be permitted.

WHEN A TIDAL FLAT IS DETERMINED TO BE SIGNIFICANT TO MARINE FISHERIES OR THE PROTECTION OF WILDLIFE HABITAT, THE FOLLOWING REGULATION SHALL APPLY:

(6) In addition to complying with the requirements of 310 CMR 10.27(3) and 10.27(4), a project on a tidal flat shall if water-dependent by designed and constructed, using best available

measures, so as to minimize adverse effects, and if non-water-dependent, have no adverse effects on marine fisheries and wildlife habitat caused by:

(a) alterations in water circulation,

(b) alterations in the distribution of sediment grain size, and

(c) changes in water quality, including, but not limited to, other than natural fluctuations in the levels of dissolved oxygen, temperature or turbidity, or the addition of pollutants.

(7) Notwithstanding the provisions of 310 CMR 10.27(3) through 10.27(6), no project may be permitted which will have any adverse effect on specified habitat sites or rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.28: Coastal Dunes

(1) Preamble. All coastal dunes are likely to be significant to storm damage prevention and flood control, and all coastal dunes on barrier beaches and the coastal dune closest to the coastal beach in any area are per se significant to storm damage prevention and flood control. Coastal dunes are also often significant to the protection of wildlife habitat.

Coastal dunes aid in storm damage prevention and flood control by supplying sand to coastal beaches. Coastal dunes protect inland coastal areas from storm damage and flooding by storm waves and storm elevated sea levels because such dunes are higher than the coastal

beaches which they border. In order to protect this function, coastal dune volume must be maintained while allowing the coastal dune shape to conform to natural wind and water flow patterns.

Vegetation cover contributes to the growth and stability of coastal dunes by providing conditions favorable to sand deposition.

On retreating shorelines, the ability of the coastal dunes bordering the coastal beach to move landward at the rate of shoreline retreat allows these dunes to maintain their form and volume, which in turn promotes their function of protecting against storm damage or flooding.

A number of birds, most commonly terns and gulls, nest at the base or sides of dunes. In some dune systems other birds also nest in the interdunal area, the species being determined by the plant community structure, topography, and hydrologic regime of the area. In a few dune systems, wet meadows or vernal pool habitats occur, which serve as important feeding areas for a wide variety of bird species.

When a proposed project involves the dredging, filling, removal or alteration of a coastal dune, the issuing authority shall presume that the area is significant to the interests of storm damage prevention, flood control and the protection of wildlife habitat. This presumption may be overcome only upon a clear showing that a coastal dune does not play a role in storm damage prevention, flood control or the protection of wildlife habitat, and if the issuing authority makes a written determination to that effect.

When a coastal dune is significant to storm damage prevention, flood control or the protection of wildlife habitat, the following characteristics are critical to the protection of those interest(s):

(a) The ability of the dune to erode in response to coastal beach conditions;

(b) dune volume;

(c) dune form, which must be allowed to be changed by wind and natural water flow;

(d) vegetative cover;

(e) the ability of the dune to move landward or laterally; or

(f) the ability of the dune to continue serving as bird nesting habitat.

(2) Definition. Coastal dune means any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune also means sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control.

WHEN A COASTAL DUNE IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION, FLOOD CONTROL OR THE PROTECTION OF WILDLIFE HABITAT, THE FOLLOWING REGULATIONS SHALL APPLY:

(3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:

(a) affecting the ability of waves to remove sand from the dune;

(b) disturbing the vegetative cover so as to destabilize the dune;

(c) causing any modification of the dune form that would increase the potential for storm or flood damage;

(d) interfering with the landward or lateral movement of the dune;

(e) causing removal of sand from the dune artificially; or

(f) interfering with mapped or otherwise identified bird nesting habitat.

(4) Notwithstanding the provisions of 310 CMR 10.28(3), when a building already exists upon a coastal dune, a project accessory to the existing building may be permitted, provided that such work, using the best commercially available measures, minimizes the adverse effect on the coastal dune caused by the impacts listed in 310 CMR 10.28(3)(b) through 10.28(3)(e). Such an accessory project may include, but is not limited to, a small shed or a small parking area for residences. It shall not include coastal engineering structures.

(5) The following projects may be permitted, provided that they adhere to the provisions of 310 CMR 10.28(3):

(a) pedestrian walkways, designed to minimize the disturbance to the vegetative cover and traditional bird nesting habitat;

(b) fencing and other devices designed to increase dune development; and

(c) plantings compatible with the natural vegetative cover.

(6) Notwithstanding the provisions of 310 CMR 10.28(3) through (5), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

* * *

10.30: Coastal Banks

(1) Preamble. Coastal banks are likely to be significant to storm damage prevention and flood control. Coastal banks that supply sediment to coastal beaches, coastal dunes and barrier beaches are per se significant to storm damage prevention and flood control. Coastal banks that, because of their height, provide a buffer to upland areas from storm waters are significant to storm damage prevention and flood control.

Coastal banks composed of unconsolidated sediment and exposed to vigorous wave action serve as a major continous [sic] source of sediment for beaches, dunes, and barrier beaches (as well as other land forms caused by coastal processes). The supply of sediment is removed from banks by wave action, and this removal takes place in response to beach and sea conditions. It is a naturally occurring process necessary to the continued existence of coastal beaches, coastal dunes and barrier beaches which, in turn, dissipate storm wave energy, thus protecting structures of coastal wetlands landward of them from storm damage and flooding.

Coastal banks, because of their height and stability, may act as a buffer or natural wall, which protects upland areas from storm damage and flooding. while erosion caused by wave action is an integral part of shoreline processes and furnishes important sediment to downdrift landforms, erosion of a coastal bank by wind and rain runoff, which plays only a minor role in beach nourishment, should not be increased unnecessarily. Therefore, disturbances to a coastal bank which reduce its natural resistance to wind and rain erosion cause cuts and gullys in the bank, increase the risk of its collapse, increase the danger to structures at the top of the bank and decrease its value as a buffer.

Bank vegetation tends to stabilize the bank and reduce the rate of erosion due to wind and rain runoff. Pedestrian and vehicular traffic damages the protective vegetation and frequently leads to gully erosion or deep "blow-outs" or unconsolidated banks. Therefore, any project permitted by 310 CMR 10.30 should incorporate, when appropriate, elevate walkways.

A particular coastal bank may serve both as a sediment source and as a buffer, or it may serve only one role.

When a proposed project involves dredging, removing, filling, or altering a coastal bank, the issuing authority shall presume that the area is significant to storm damage prevention and flood control. This presumption may be overcome only upon a clear showing that a coastal bank does not play a role in storm damage prevention or flood control, and if the issuing

authority makes a written determination to that effect.

When issuing authority determines that a coastal bank is significant to storm damage prevention or flood control because it supplies sediment to coastal beaches, coastal dunes or barrier beaches, the ability of the coastal bank to erode in response to wave action is critical to the protection of that interest(s).

When the issuing authority determines that a coastal bank is significant to storm damage prevention or flood control because it is a vertical buffer to storm waters, the stability of the bank, i.e., the natural resistance of the bank to erosion caused by wind and rain runoff, is critical to the protection of that interest(s).

(2) Definition. Coastal Bank means the seaward face or side of any elevated landform, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland.

WHEN A COASTAL BANK IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION OR FLOOD CONTROL BECAUSE IT SUPPLIES SEDIMENT TO COASTAL BEACHES, COASTAL DUNES OR BARRIER BEACHES, THE FOLLOWING REGULATIONS SHALL APPLY:

(3) No new bulkhead, revetment, seawall, groin or other coastal engineering structure shall be permitted on such a coastal bank except that such a coastal engineering structure shall be permitted when required to prevent storm damage to buildings constructed prior to the effective date of these regulations or constructed

pursuant to a Notice of Intent filed prior to the effective date of these regulations (August 10, 1978), including reconstructions of such buildings subsequent to the effective date of these regulations, provided that the following requirements are met:

(a) a coastal engineering structure or a modification thereto shall be designed and constructed so as to minimize, using best available measures, adverse effects on adjacent or nearby coastal beaches due to changes in wave action, and

(b) the applicant demonstrates that no method of protecting the building other than the proposed coastal engineering structure is feasible,

(c) protective planting designed to reduce erosion may be permitted.

(4) Any project on a coastal bank or within 100 feet landward of the top of a coastal bank, other than a structure permitted by 310 CMR 10.30(3), shall not have an adverse effect due to wave action on the movement of sediment from the coastal bank to coastal beaches or land subject to tidal action.

(5) The Order of Conditions and the Certificate of Compliance for any new building within 100 feet landward of the top of a coastal bank permitted by the issuing authority under this Act shall contain the specific condition: 310 CMR 10.30(3) of the Wetlands Regulations, promulgated under M.G.L. c. 131, s. 40, requires that no coastal engineering structure, such as a bulkhead, revetment, or seawall shall be permitted on an eroding bank at any time in the future to

protect the project allowed by this Order of Conditions.

WHEN THE COASTAL BANK IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION OR FLOOD CONTROL BECAUSE IT IS A VERTICAL BUFFER TO STORM WATERS, THE FOLLOWING REGULATIONS SHALL APPLY:

(6) Any project on such a coastal bank or within 100 feet landward of the top of such coastal bank shall have no adverse effects on the stability of the coastal bank.

(7) Bulkheads, revetments, seawalls, groins or other coastal engineering structures may be permitted on such a coastal bank except when such bank is significant to storm damage prevention or flood control because it supplies sediment to coastal beaches, coastal dunes, and barrier beaches.

(8) Notwithstanding the provisions of 310 CMR 10.30(3) through (7), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

* * *

10.36: Variance

The Commissioner may waive the application of any regulation(s) in Part II of 310 CMR 10.00 when he finds, after opportunity for an adjudicatory hearing, that:

(1) there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with the regulation(s);

(2) that mitigating measures are proposed that will allow the project to be conditioned so as to contribute to the protection of the interests identified in the Act; and

(3) that the variance is necessary to accommodate an overriding community, regional, state or national public interest; or that it is necessary to avoid an Order that so restricts the use of property as to constitute an unconstitutional taking without compensation.

Procedure.

A request for a variance shall be made in writing and shall include, at a minimum, the following information:

(a) a description of alternatives explored that would allow the project to proceed in compliance with the regulation(s) and an explanation of why each is unreasonable;

(b) a description of the mitigating measures to be used to contribute to the protection of the interests identified in the Act; and

(c) evidence that an overriding public interest is associated with the project which justifies waiver of the regulation(s), or evidence that the Superseding Order so restricts the use of the land that it constitutes an unconstitutional taking without compensation.

The request for a variance shall be sent to the Department by certified mail or hand delivered and a copy thereof shall at the same time be sent by certified mail or hand delivered to the conservation commission and any other parties.

After reviewing the information submitted with the request for a variance and any other information submitted by any party within 21 days of the request, the Commissioner shall issue a decision as to whether to grant the request.

Within ten days of the date of issuance of the Commissioner's decision on the variance, any person specified in 310 CMR 10.05(7)(j) may, according to the procedures specified in that section, request an adjudicatory hearing on the decision. At the adjudicatory hearing, the applicant has the burden of demonstrating that the project meets the criteria necessary for a variance. Other parties to the adjudicatory hearing may introduce evidence either in favor of or opposing the request for a variance.

For projects in which all of the proposed work will be undertaken on land within the boundaries of one city or town, the request for a variance shall not be filed until the applicant first files a Notice of Intent with the Conservation Commission. The Commission shall review the project in accordance with the procedures set forth in Part I of 310 CMR 10.00 and issue an Order of Conditions consistent with Part II of 310 CMR 10.00. Within ten days of the issuance of the Order of Conditions, the applicant may request the Department to issue a Superseding Order. The Department staff shall review the

project in accordance with the procedures set forth in Part I of 310 CMR 10.00 and shall issue a Superseding Order consistent with the provisions of Part II of 310 CMR 10.00. Within ten days of the issuance of the Superseding Order, the applicant may request an adjudicatory hearing on that order and/or a variance under 310 CMR 10.36 according to the procedure previously described.

For projects in which the proposed work will be undertaken on land within the boundaries of more than one city or town, the applicant may file a request for a variance directly with the Commissioner, with a copy to each affected conservation commission. If, after public notice, the Commissioner finds that a project meets the variance criteria, he shall specify which regulation(s) has been waived and what general requirements or conditions must be met to satisfy the above-stated variance criteria. The applicant shall then file a Notice of Intent with the appropriate conservation commissions in accordance with the procedures contained in Part I of 310 CMR 10.00. The conservation commissions shall issue Orders of Conditions consistent with all provisions of Part II of 310 CMR 10.00 except those waived by the Commissioner and containing any additional conditions or requirements imposed by the Commissioner in the variance. The usual procedures contained in Part I of 310 CMR 10.00 for requesting Superseding Orders and adjudicatory hearings remain applicable.

Commentary

310 CMR 10.36, which provides that the Commissioner may waive the application of one or more of the regulations on the basis of overriding public benefit is intended to be employed only in rare and unusual cases. The provision authorizing a variance request directly to the Commissioner for projects on land within more than one city or town is intended to apply to projects that involve functionally related work in several contiguous towns (e.g., transportation and energy transmission facilities) and to provide for a single uniform determination concerning alternative locations and the other variance criteria.

* * *

Massachusetts General Laws,
Chapter 30, Sections 61-62H

§ 61. Determination of impact by agencies; damage to environment; prevention or minimization; definition applicable to this section and section 62

All agencies, departments, boards, commissions and authorities of the commonwealth shall review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and shall use all practicable means and measures to minimize damage to the environment. Unless a clear contrary intent is manifested, all statutes shall be interpreted and administered so as to minimize and prevent damage to the environment. Any determination made by an agency of the commonwealth shall include a finding describing the environmental impact, if any, of the project and the finding that all feasible measures have been taken to avoid or minimize said impact.

As used in this section and section sixty-two, "damage to the environment" shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth and shall include but not be limited to air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds, or other surface or subsurface water resources; destruction of seashores, dunes, marine resources, underwater archaeological resources, wetlands, open spaces, natural areas, parks, or historic districts or sites. Damage to the environment shall not be

construed to include any insignificant damage to or impairment of such resources.

* * *

§ 62. Definitions

For the purposes of sections sixty-one to sixty-two H, inclusive, the following words shall have the following meanings unless the context otherwise requires: –

"Agency", an agency, department, board, commission or authority of the commonwealth, and any authority of any political subdivision which is specifically created as an authority under special or general law.

"Permit", a permit determination, order or other action, including the issuance of a lease, license, permit, certificate, variance, approval or other entitlement for use, granted to any person, firm or corporation, including trusts, voluntary association or other forms of business organizations by an agency for a project but shall not include a general entitlement to a person to carry on a trade or profession or to operate mechanical equipment which does not depend upon the location of such trade or operation.

"Person", a private person, firm or corporation, or any governmental entity which is not an agency.

"Project", work, project, or activity either directly undertaken by an agency, or if undertaken by a person, which seeks the provision of financial assistance by an agency, or requires the issuance of a permit by an agency but shall not include a grant of aid for medical services or personal support, such as welfare or unemployment

funds, to an individual or a third party on behalf of an individual.

* * *

§ 62A. Notice of intent to apply; forms; certification of need for environmental impact report; application of section

A person applying or intending to apply to an agency for a permit or for financial assistance for a project may, at any time prior to, but, in any event, shall no later than ten days after filing the first application for such permit or assistance notify the secretary of environmental affairs of the nature of the project and of such application, if any, on such forms as said secretary shall prescribe and shall transmit copies of said notification forms to such agency from which a permit or financial assistance is or may be sought. Any agency proposing a project may file said notification forms prior to the development of the project and shall file said forms no later than the secretary of environmental affairs shall by regulation prescribe. Within thirty days after issuance of notice of the receipt of such notification, the secretary shall consult with the person or agency proposing the project and the agency, if any, from which a permit or financial assistance is or may be sought and shall issue a certificate stating whether an environmental impact report is required. If a report is required, the secretary with the cooperation of said person and agency shall, within the above mentioned thirty day period, limit the scope of the report to those issues which by the nature and location of the project are likely to cause damage to the environment. The secretary shall

determine the form, content, level of detail and alternatives required for the report. In the case of a permit application to an agency from a private person for a project for which financial assistance is not sought the scope of said report and alternatives considered therein shall be limited to that part of the project which is within the subject matter jurisdiction of the permit. Any finding required by section sixty-one shall be limited to those matters which are within the scope of the environmental impact report, if any, required by this section.

In the case of a major and complicated project, the secretary of environmental affairs, with the agreement of the agencies and persons who are proposing, providing public financial assistance for or issuing permits for a project subject to sections sixty-two to sixty-two H, inclusive, may establish a specific procedure for evaluation and review of the environmental impacts of said project. This section shall not apply to the placing, maintaining, repairing or relocating of poles, wires, conduits, cables, pipes and associated fixtures by public utility companies under section seventy-one of chapter one hundred and sixty-four and sections twenty-one to twenty-two, inclusive, of chapter one hundred and sixty-six.

* * *

§ 62B. Environmental impact reports; preparation and submission; funding

In the case of projects directly undertaken by an agency, the environmental impact report shall be prepared and submitted by the responsible agency. If two or more agencies are responsible, a joint report shall be

prepared and submitted by the agency designated by the secretary of environmental affairs. In the case of projects which require a permit or financial assistance from an agency, said report shall be prepared and submitted by the person or agency seeking the permit or financial assistance.

Public funds made available for the purpose of design of or planning or undertaking a project subject to sections sixty-two to sixty-two H, inclusive, may be expended for the research, preparation, and publication of the report and expenses incidental thereto, and said funds may be transferred or otherwise may be made available to other agencies designated by the secretary of environmental affairs to evaluate the draft or final report.

An environmental impact report shall contain statements describing the nature and extent of the proposed project and its environmental impact; all measures being utilized to minimize environmental damage; any adverse short-term and long-term environmental consequences which cannot be avoided should the project be undertaken; and reasonable alternatives to the proposed project and their environmental consequences. The secretary shall encourage agencies and persons to commence preparation of reports during the initial planning and design phase of projects. Said report shall be prepared and disseminated to inform the originating or permitting agency, reviewing agencies, the appropriate regional planning commission, the attorney general and the public of the environmental consequences of state actions and the alternatives thereto prior to any commitment of state funds for and prior to the commencement of the project if undertaken by an agency or prior to the issuance of any

permit or grant of financial assistance for the project if undertaken by a person.

* * *

§ 62C. Notice of availability of environmental impact statement; public and agency review

Any environmental impact report shall be submitted to the secretary of environmental affairs who shall issue public notice of the availability of such report.

A reviewing agency or person, and any agency which has jurisdiction by law or special expertise with respect to any environmental impact involved may submit written comments on any draft or final environmental impact report to the secretary of environmental affairs who shall affix any such comments which are timely received to his statement on such reports. Said reports and any comments submitted in review thereof shall be public documents.

No agency shall undertake a project which is not exempted by the provisions of any law and which may cause damage to the environment or grant a permit or financial assistance for such a project until sixty days after the secretary of environmental affairs issues such notice, provided that an agency or person may undertake research, planning, design and other preliminary work necessary to describe and evaluate such projects for the purposes of sections sixty-two to sixty-two H, inclusive.

There shall be a public and agency review period of thirty days from the notice of the availability of any draft

or final report, provided that the secretary of environmental affairs may extend the review period for a draft report on a major and complicated project for a period not to exceed thirty days. A statement of the secretary indicating whether or not in his judgment said report adequately and properly complies with the provisions of sections sixty-two to sixty-two H, inclusive, shall be issued within seven days after the public and agency review period. The approval or disapproval of said secretary of any such report shall not be required.

At least twice per month the secretary shall issue notice of all filings and of the availability of all reports received during the preceding half month, which notice shall be in such form as the secretary shall determine is reasonably suited to informing all interested agencies and persons of the receipt of such filings and the availability of such reports.

* * *

§ 62D. Permit applications; time for agency determination

Agencies shall act on permit applications within ninety days following issue of notice of availability of the final environmental impact report, within ninety days following issue of notice of the determination that a report is not required, or ninety days following the permit application, whichever is latest, unless otherwise provided by law.

* * *

§ 62E. Categories of projects and permits not requiring environmental impact reports; establishment

With the approval of the secretary of the executive office have having jurisdiction over an agency, or if an agency is not within an executive office, with the approval of such agency, the secretary of environmental affairs shall establish general and special categories of projects and permits which shall or shall not require environmental impact reports based upon the scope and duration of potential impacts from the nature, size and location of said projects or portions thereof which require permits.

* * *

§ 62F. Emergencies; commencement of projects; land acquisition

A project may commence prior to compliance with sections sixty-two to sixty-two H, inclusive, if emergency action by a person or agency is essential to avoid or eliminate a threat to public health or safety, or a threat to any natural resources; provided, that wherever practicable, the agency or person shall obtain the prior approval of the secretary of environmental affairs. Following commencement of any such project, the agency or person shall promptly, but in any case within sixty days, commence compliance with the provisions of sections sixty-two to sixty-two H, inclusive.

In the case of an urban renewal project proposed under chapters one hundred and twenty-one A or one hundred and twenty-one B, the specific procedure under

section sixty-two A may permit land acquisition and other actions required for land acquisition to take place prior to the publication of the final environmental impact report provided that the secretary has issued notice of availability of an interim environmental impact report which demonstrates to the satisfaction of said secretary that an urban renewal project may be carried out on the proposed land with appropriate constraints as may be necessary to minimize and prevent damage to the environment.

* * *

§ 62G. Federal environmental impact statements in lieu of reports

In the case of projects for which an environmental impact statement is required under the National Environmental Policy Act of 1969, draft and final federal environmental impact statements may be submitted in lieu of environmental impact reports.

* * *

§ 62H. Action or proceeding alleging improper determination of need for environmental impact report or noncompliance with law; notice; commencement; matters raised

An agency or person intending to commence an action or proceeding alleging an improper determination of whether a project requires the preparation of an environmental impact report under section sixty-two A, shall first provide notice of intention to commence such action

or proceeding within sixty days of issuance of notice of such determination. An agency or person intending to commence an action or proceeding alleging that a final environmental impact report fails to comply with the requirements of sections sixty-two to sixty-two G, inclusive, shall first provide notice of intention to commence such action or proceeding within sixty days of issuance of notice of availability of said final environmental impact report pursuant to section sixty-two C. Said notices of intention shall be in such form as the secretary of environmental affairs shall prescribe, shall identify with particularity the issues to be considered in any such action or proceeding, shall be in lieu of the notice and waiting period required by section seven A of chapter two hundred and fourteen, and shall be provided to the attorney general, the agency or person proposing the project and the secretary of environmental affairs.

Any action or proceeding alleging an improper determination that a project requires the preparation of an environmental impact report under section sixty-two A shall commence no later than thirty days following the first issuance of a permit or grant of financial assistance by an agency or no later than sixty days after issuance of notice of such determination, whichever occurs later, for a private project, or no later than one hundred and twenty days after issuance of notice of such determination for a public project. Any action or proceeding alleging that a final environmental impact report fails to comply with the provisions of section sixty-two and sixty-two G, inclusive, shall commence no later than thirty days following the first issuance of a permit or grant of financial assistance by an agency for a private

project or no later than one hundred and twenty days after issuance of notice of availability of said final environmental impact report under section sixty-two C, for a public project.

No allegation shall be made in any action or proceeding under this section unless the matter complained of was raised at the appropriate point in the administrative review procedures; provided that a matter may be raised upon a showing that it is material and that is was not reasonably possible with due diligence to have raised it during such procedures or that the matter sought to be raised is of critical importance to the environmental impact of the project.

If a court determines that an agency or person proposing a project has knowingly concealed a material fact or knowingly submitted false information in any form or report required under section sixty-two to sixty-two H, inclusive, limits on the manner and time in which actions or proceedings may be commenced shall not apply and the secretary of environmental affairs may require the preparation and review of such forms or reports as may be necessary to correct any deficient form or report.

The secretary of environmental affairs shall, after consultation with other secretaries of executive offices and with agencies not within executive offices, promulgate reasonable rules and regulations to carry out the purposes of sections sixty-two to sixty-two H, inclusive.

* * *

The Commonwealth of Massachusetts

SECRETARY OF STATE

REGULATION FILING AND PUBLICATION

1. Regulation Chapter Number and Heading:

   301 CMR 11.00 – 12.00

2. Name of Agency:

   Executive Office of Environmental Affairs

3. This document is reprinted from the Code of Massachusetts Regulations and contains the following:

   301 CMR 11.00 Massachusetts Environmental Policy Act (MEPA) Regulations

   12.00 Areas of Critical Environmental Concern (ACEC)

Under the provisions of Massachusetts General Laws, Chapter 30A, Section 6 and Chapter 233, Section 75, this document may be used as evidence of the original documents on file with the State Secretary.

Compiled as in full force and effect: 12/1/93

A true copy attest:
/s/ Michael J. Connolly
MICHAEL JOSEPH CONNOLLY
Secretary of State

301 CMR: EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS

301 CMR 11.00: MEPA REGULATIONS

Section

11.01: General Provisions
11.02: Definitions and Abbreviations
11.03: Determining the Need for MEPA Review
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11.05: Review of the ENF – Consultation
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* * *

11.16: Segmentation

In determining review threshold status and conducting project review, the entirety of a proposed project, including likely future expansions, shall be considered, and not separate phases or segments thereof. In determining whether two or more projects are in fact one project, all circumstances are to be considered, including but not limited to time interval between phases, whether the projects, taken together, constitute a common plan or scheme, and whether environmental impacts are separable. Ownership by different entities does not necessarily indicate that two projects are separate. It is the intent of this rule that projects not be segmented or phased to evade or defer review.

COMMONWEALTH OF MASSACHUSETTS
BARNSTABLE, SS SUPERIOR COURT
C.A. NO.

ALFRED NELSON, EVELYN NELSON,
LEWIS HICKS, III, AND BERNICE HICKS,
Plaintiffs

V.

COMMONWEALTH OF MASSACHUSETTS,
Defendant

COMPLAINT

Parties

1. Plaintiffs are Alfred Nelson and Evelyn Nelson, 27 Morris Island Road, Chatham, Barnstable County, Massachusetts.

2. Plaintiffs are Lewis Hicks, III and Bernice Hicks, 40 Dune Drive, Chatham, Barnstable County, Massachusetts.

3. The defendant is the Commonwealth of Massachusetts and its subdivisions, including but not limited to the Department of Environmental Protection (DEP) and Coastal Zone Management (CZM).

Facts

4. The plaintiffs own shorefront property in the Town of Chatham, Massachusetts, bordering Chatham Harbor.

5. The combined 1987 value of plaintiffs' properties exceeds two million dollars.

6. In early 1987, the outer sand bar in Chatham harbor, North Beach, was breached by the sea. The ocean opened a one mile gap in the sand bar. The breach exposed plaintiffs' properties to the direct force of ocean waves and tides. In November, 1988 defendant classified Chatham Harbor as an emergency area.

7. For some time, the sea deposited sand before plaintiffs' beachfront properties. Since spring 1989 the sea has eroded the sand, flooded plaintiffs' property and threatened to destroy their homes.

8. Seawalls are plaintiffs only means of stopping said flood and saving their homes. Without flood protection (seawalls), plaintiffs' lots are without value.

9. The Nelson property is built on the former Chatham Town Dump. Seawalls are necessary to prevent toxic materials and refuse from polluting Chatham Harbor.

10. Defendant has allowed more than fifty property owners with homes bordering Chatham Harbor to construct seawalls. Defendant has reviewed and approved specifications for stone seawalls for said area. Defendant has denied plaintiffs' permission to construct seawalls of any type.

11. The Hicks lot is at sea level and has no flood protection. The sea destroyed 70 feet of the Nelson property in twenty-four hours (November, 1990). Further delay in flood control will result in the irretrievable destruction of plaintiffs' properties and neighboring properties.

12. Defendant's regulations concerning "flood control" (310 CMR 10.01 et seq., pursuant to G.L. c. 131, sec. 40, the "Wetlands Protection Act") frustrate the stated legislative purpose of the Act. The regulations ensure flooding in dune areas.

13. Defendant has classified plaintiffs' properties as dune sand. Defendant's regulations prohibit seawalls in dune sand on the theory that the cure for flooding is further flooding.

14. Defendant is currently taking from three to five years to process flood control requests for dune areas.

15. Defendant's experts admit that without flood control the Commonwealth will lose land valued in excess of ten billion dollars over forty years. The loss is based on a sea level rise of one-and-a-half feet and resulting state-wide loss of 227 acres per year.

16. This figure does not include land loss due to emergency conditions such as the Chatham flood. The flood will continue for forty years. Tides currently run five to eleven feet above pre-breach tides. To date the flood has destroyed ten properties. The Town of Chatham values this loss at eight million dollars.

17. Without seawalls, Chatham will lose a total of 450 acres of land currently assesssed [sic] at 111 million dollars to flooding over forty years. This represents ten percent of the Town's revenues.

18. Plaintiffs have given notice of the claims outlined in this Complaint to the Secretary of the Executive Office of Environmental Affairs.

Count I: Injunctive Relief

19. Plaintiffs restate allegations set forth in paragraphs one through eighteen of this Complaint.

WHEREFORE, plaintiffs pray that this Honorable Court enter the following Orders pursuant to its general superintendency powers and statutes including but not limited to G.L. c. 231A, sec. 2:

PRAYER I: Plaintiffs are allowed to construct the following on properties at Chatham Harbor, Chatham, Barnstable County, Massachusetts:

a) Stone seawalls per specifications of defendant for the Chatham Harbor area, with height twenty feet above beach elevation and depth twelve feet below said elevation; or

b) Steel bulkheads with height twenty feet above beach elevation and depth twelve feet below said elevation.

PRAYER II: Seawalls requested in Prayer I shall remain in place until issues raised in plaintiffs' Complaint are settled or fully adjudicated. Plaintiffs will post a bond of $20,000.00 with this Court to cover the cost of removal of said seawalls. Said bond shall remain posted until issues raised in plaintiffs' Complaint are settled or fully adjudicated.

PRAYER III: That regulations entitled 310 CMR 10.00 et seq. are unconstitutional and without force.

Count II: Unconstitutional Conduct

20. Plaintiffs restate allegations set forth in paragraphs one through eighteen of this Complaint.

21. Defendant's regulatory scheme pursuant to G.L. c. 131, sec. 40 (Wetlands Protection Act) irrationally imposes unfounded, outmoded, and unscientific beliefs upon plaintiffs.

22. Said regulatory scheme relies on theories and presumptions that are illogical, ambiguous, overly broad, and unsuited to furthering the purpose of the Wetlands Protection Act.

23. The regulatory presumption that dune sand and sand transport are significant to flood control is without scientific merit.

24. Said regulatory scheme amounts to the unconstitutional imposition of religious or quasi-religious beliefs by defendant.

25. Said regulatory scheme illogically presumes that flooding is the cure to flooding.

26. Defendant's imposition of said regulatory scheme has lead to the destruction of plaintiffs' property without due process.

WHEREFORE, plaintiffs pray that this Court find said regulations unconstitutional under both the Massachusetts and United States Constitutions, allow plaintiffs the relief requested in Count I of this Complaint, and award plaintiffs damages for the destruction of their property, for the destruction of their property without due process, for expenses incurred in reclaiming said

property, including but not limited to increased costs of seawall construction and landfill, and other proximately caused and consequential damages including but not limited to engineering fees, construction costs, time from business, and attorneys fees and costs.

Count III: Negligence

27. Plaintiffs restate allegations set forth in paragraphs one through twenty-six of this Complaint.

28. Defendant negligently, wrongfully, or maliciously ignored scientific fact in implementing and enforcing the Wetlands Protection Act.

29. Defendant negligently or wrongfully supervised its empoloyees [sic] or representatives, whose acts or omissions lead to the destruction of plaintiffs' properties.

30. Defendant negligently, wrongfully, or maliciously:

(a) undertook to provide plaintiffs with flood control;

(b) ignored plaintiffs' dire situation;

(c) ignored or withheld information concerning the extent of the Chatham flood;

(d) ignored plaintiffs' clear showing that dunes on plaintiffs' property do not provide flood prevention as theorized in the regulations; and

(e) denied plaintiffs flood control knowing that denial would directly and proximately result in the

immediate destruction of plaintiffs' property, the destruction of neighboring properties, and the pollution of Chatham Harbor.

31. Defendant's denial of flood control directly and proximately lead to the destruction of plaintiffs' property.

WHEREFORE, plaintiffs pray that this Honorable Court award plaintiffs damages for the destruction of their property, expenses incurred in reclaiming said property, including but not limited to increased costs of seawall construction and landfill, and other proximately caused and consequential damages including but not limited to engineering fees, construction costs, time from business, and attorneys fees and costs.

Count IV: Taking of Property without Compensation and Regulatory Taking without Compensation

32. Plaintiffs restate allegations set forth in paragraphs one through twenty-six of this Complaint.

33. Defendant's refusal to allow plaintiffs to flood protect their properties has resulted in the destruction of said properties.

34. Defendant's actions amount to an actual taking of plaintiffs' properties.

35. Defendant's refusal to allow plaintiffs to flood protect their properties pursuant to G.L. c. 131, sec. 40 has resulted in the total destruction of plaintiffs' properties.

WHEREFORE, plaintiffs pray that this Honorable Court award plaintiffs damages for the destruction of

their property, and other proximately caused and consequential damages including but not limited to engineering fees, time lost from business, and attorneys fees and costs.

ALFRED NELSON, EVELYN NELSON, LEWIS HICKS, III, AND BERNICE HICKS,
By their attorneys,

/s/ Nicholas B. Soutter
Nicholas B. Soutter
BBO #473740
Paul S. McGovern
BBO #549167
One Washington Street
Suite 208
Wellesley, MA 02181
(17) [sic] 237-6300

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the defendant Commonwealth of Massachusetts by hand.

Date: 12-24-90 /s/ Nicholas B. Soutter
Nicholas B. Soutter

(LOGO) Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of
Environmental Protection
Southeast Regional Office

William F. Weld
Governor
Daniel S. Greenbaum
Commissioner

May 27, 1992

Nicholas B. Soutter, Esq.
Attorney at Law
One Washington Street
Wellesley, Massachusetts
02181

RE: CHATHAM – Wetlands
File #SE 10-987

Dear Mr. Soutter:

The Department of Environmental Protection is in receipt of your May 15, 1992, letter expressing your understanding that the Department no longer has jurisdiction over the above-referenced filing for failure to issue a Superseding Order of Conditions within 70 days of request (310 CMR 10.05 (7)(f)). The Department differs with this understanding as explained below.

In accordance with 310 CMR 10.05 (7)(f), as noted above, "within seventy (70) days of receipt of a request, the Department shall issue a Superseding Order unless (underline added) either of the following apply, or in the event that both apply, whichever is later:

1. compliance with MEPA is required, in which case the Department shall issue a Superseding

> Order within forty (40) days of the issuance of a statement by the Secretary of the Executive Office of Environmental Affairs that the applicant has complied with MEPA and the regulations promulgated thereunder;"

The above-referenced applicant (Mr. Alfred B. Nelson) has had a previous proposal (Wetlands File No. SE 10-804) before the Department that was subject to MEPA review. Specifically, an Environmental Notification Form (ENF) was filed for Mr. Nelson, EOEA #8133, that received a Certificate from the Secretary of Environmental Affairs on March 14, 1990, stating that the internally armored artificial dune project proposal (Wetlands Filed No. SE 10-804) Requires the preparation of an Environmental Impact Report (EIR). To the best of the Department's knowledge, this Certificate is still valid and an EIR has not been filed with the MEPA office. Therefore, because the current project proposal under Wetlands File No. SE 10-987 for a stone breakwater is essentially the same or similar to the earlier-proposed internally armored artificial dune, the above-mentioned MEPA requirement still applies.

Since MEPA compliance is required before the Department can permit the current project proposal, the Department was awaiting MEPA compliance before issuing a Superseding Order within forty (40) days of the issuance of a statement by the Secretary of the Executive Office of Environmental Affairs that the applicant has complied with MEPA and the regulations promulgated thereunder. Alternatively, the Department could deny the current project proposal without prejudice before MEPA has been complied with and your client could file another

Notice of Intent when the MEPA process has been completed.

Please inform this office if you wish the Department to issue a Superseding Order on your client's current project proposal (Wetlands File No. SE10-987) before the MEPA process has been completed. Please be advised, however, if you choose to have the current project proposal acted upon now, the Department would have no alternative other than to deny the project for failure to comply with MEPA and for non-compliance with the Wetland Regulations.

If you have any questions concerning this matter please contact me, or Jim Mahala, at telephone number (508)946-2800, or at the above-referenced address.

Very truly yours,

/s/ Elizabeth A. Kouloheras
Elizabeth A. Kouloheras, Chief
Wetlands Section

K/JM/lr

cc: Chatham Conservation Commission
549 Main Street
Chatham, MA 02633

Alfred B. Nelson
27 Morris Island Road
Chatham, MA 02633

Carl Dierker, Esq.
DEP-OGC, 3rd Floor

cc: Madelyn Morris, Esq.
Assistant Attorney General
Office of the Attorney General
John W. McCormack Building
Boston, MA 02202

MEPA – Unit

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
100 Cambridge Street
Boston, Massachusetts 02202

(LOGO)
MICHAEL S. DUKAKIS
GOVERNOR

JAMES S. HOYTE
SECRETARY

CERTIFICATE OF THE SECRETARY OF
ENVIRONMENTAL AFFAIRS ON THE
ENVIRONMENTAL NOTIFICATION FORM

PROJECT NAME	:	Breach Project
PROJECT LOCATION	:	Chatham
EOEA NUMBER	:	7345
PROJECT PROPONENT	:	Breach Group
DATE NOTICED IN MONITOR	:	September 27, 1988

Pursuant to the Massachusetts Environmental Policy Act (G.L.,c.30,s.62-62H) and Sections 11.06 of the regulations implementing MEPA (301 CMR 11.00), I hereby determine that the above project requires the preparation of an Environmental Impact Report.

This project is an attempt to protect developed areas in Chatham from the damaging wave climate resulting from the 1987 breach to the Nauset Beach Barrier Beach. Ten home owners were involved. To date three homes have been lost and several other owners are not sure they should move ahead with the expensive solutions. The project requested emergency consideration under MEPA regulation 11.11, which was granted in March. This allows enough action to protect the public. At this time

five or more additional owners are seeking to protect their property and others are trying to stabilize existing beaches.

It is my conclusion that further environmental analysis is required and that these analyses must evaluate all the proposals for the section from the town fishing pier to Morris Island. The options are an integrated solution to the entire section which appears to be threatened for approximately ten years each century, or multiple short segments which may exaggerate the erosion to each segment not so protected. At a minimum the EIR must firmly identify which segments are to be built, the impacts of each to adjacent properties, available mitigation and a commitment to minimize said impacts.

At this time I urge all owners anticipating armoring or other alteration to the bank within the next year to file with the MEPA unit immediately. Upon identifying all proposed actions, I shall anticipate a single EIR to address the issues in this preliminary scope.

SCOPE

I. The EIR must identify the properties where erosion control structures are to be or have been constructed between the fish pier on the north and Morris Island.

II. Describe each of the proposed and existing structures. Include plans for all proposed structures.

III. The EIR must evaluate the impacts of accelerated erosion on properties to either side of each segment. Available mitigation must be evaluated and a mitigation

package proposed. The analysis must be specific for the specific protection designed for each site.

IV. Alternatives, such as nourishment of the offshore sand bar, beaches, or dunes, as a supplement to or replacement for armoring, must be evaluated.

October 27, 1988
DATE

/s/ James S. Hoyte
JAMES S. HOYTE,
SECRETARY

Comments: Chatham Conservation Commission
SOS Foundation, Inc. Petition
CZM
CCP&EDC
John Molander
Darlene Curly
Jacqueline Barett
Jane Powers
Alice & Richard Hiscock

JSH/DES/ds

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. Superior Court

ALFRED NELSON, EVELEYN NELSON, LEWIS HICKS, III, and BERNICE HICKS, Plaintiffs	
– vs –	No. 90-1712
COMMONWEALTH OF MASSACHUSETTS, Defendants	

BEFORE: Judge Elizabeth Dolan.

APPEARANCES:

NICHOLAS SOUTTER, ESQ.,
PAUL MCGOVERN, ESQ.,
One Washington Street
Wellesley, MA
representing the Plaintiffs.

Madelyn Narrs,
Asst. Attorney General
Attorney General's Office
Barnstable, MA
representing the
Commonwealth of Massachusetts.

BRUCE GILMORE, ESQ.,
1095 Route 6-A
Barnstable, MA
representing the Town of Chatham.

HAROLD GABRIEL – 969-4791
15 Van Wart Path, Newton Centre, MA 02159

* * *

[p. 16] THE COURT: The court has before it its request under essentially General Law Chapter 231, Section 2, and that deals with Count 1, in terms of irreparable harm. It's obvious that there will be immediate irreparable harm to certain home owners and individuals. Apparently, there would be some harm but less immediate. But really, we deal with the likelihood of success on the merits of this case and this complaint as filed by the court and that's really the basis for the injunctive relief.

* * *

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS SUPERIOR COURT
C.A. 90-1712

ALFRED NELSON, EVELYN NELSON,
LEWIS HICKS, III, AND BERNICE HICKS,
Plaintiffs

V.

COMMONWEALTH OF MASSACHUSETTS
AND TOWN OF CHATHAM,
Defendants

AFFIDAVIT OF ALFRED NELSON

Before me, the undersigned authority, personally appeared Alfred Nelson, who upon oath and after being duly sworn, deposes and says:

1) I am Alfred Nelson. I am a plaintiff in the above-captioned matter. I own coastal property in Chatham, Massachusetts, which is the subject of the above-captioned action.

2) In spring, 1991 I received permission from the Chatham Conservation Commission to place sand at the high water mark of my property. Said permission was granted as a flood control measure.

3) In April and May, 1991, I placed more than 3,100 cubic feet of sand at the high water mark of my property. This was over one hundred feet from my house. This "beach nourishment" cost in excess of $23,700.00

4) The storm of October 30-31, 1991 removed all of said "beach nourishment" from my property. The high water mark is now approximately twenty feet from my

house. My home was damaged in an amount approaching $100,000.00.

Signed under the pains and penalties of perjury.

/s/ Alfred B. Nelson
Alfred Nelson

STATE OF Louisiana
Parish of Caddo

_____, ss. Date: November 7, 1991

Subscribed and sworn to before me, the undersigned Notary Public.

/s/ Teresa L. White
Notary Public

Comm. Exp.: is for life

TERESA L WHITE, Notary Public
Caddo Parish, Louisiana
My Commission is for Life

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of Alfred B. Nelson	Docket No. 90-082 File No. SE 10-804 Docket No. 92-140 File No. SE 10-987

DECISION ON REQUEST FOR VARIANCE

I. ISSUES

* * *

The Department intends to hold an adjudicatory hearing on the Applicant's appeal in accordance with the schedule set forth in Exhibit "A" attached hereto. This schedule will allow the Department to have the information generated by the EIR prior to making its final decision on the proposed project as required by law.

* * *

EXHIBIT "A"

The MEPA office of the Secretary of Environmental Affairs will issue a Certificate on the Draft Environmental Impact Report approximately six weeks after it is filed. It is anticipated that a draft report will be filed soon, and that such a certificate will be issued before the end of 1993.

Within one month from the issuance of the MEPA certificate, the Department will hold a prehearing conference

on the Applicant's appeal of its denial of a Superseding Order of Conditions.

Within one month from the date of the prehearing conference the Applicant will file with the administrative law judge, all pre-filed direct testimony which the applicant intends to introduce in the adjudicatory hearing. Within one month thereafter, the Commonwealth and the Town of Chatham will file all pre-filed direct testimony which they intend to introduce at the adjudicatory hearing.

The hearing will commence within one month from the filing of all pre-filed direct testimony. The hearing record will close fourteen business days from the later to occur of the end of the hearing or the issuance by the MEPA office of a final Environmental Impact Report.

A decision will be issued within sixty days from the date that the hearing record closes.

It is within such administrative law judge's discretion to determine whether the hearing on the appeal of the Superseding Order of Conditions will be bifurcated from the hearing of the appeal of the variance denial.

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of Lewis W. Hicks	Docket No. 92-152 File No. SE 10-1024

DECISION ON REQUEST FOR VARIANCE

I. ISSUES

* * *

The Department intends to hold an adjudicatory hearing on the Applicant's appeal in accordance with the schedule set forth in Exhibit "A" attached hereto. This schedule will allow the Department to have the information generated by the EIR prior to making a final decision on the proposed project as required by law.

* * *

EXHIBIT "A"

The MEPA office of the Secretary of Environmental Affairs will issue a Certificate on the Draft Environmental Impact Report approximately six weeks after it is filed. It is anticipated that a draft report will be filed soon, and that such a certificate will be issued before the end of 1993.

Within one month from the issuance of the MEPA certificate, the Department will hold a prehearing conference

on the Applicant's appeal of its denial of a Superseding Order of Conditions.

Within one month from the date of the prehearing conference the Applicant will file with the administrative law judge, all pre-filed direct testimony which the applicant intends to introduce in the adjudicatory hearing. Within one month thereafter, the Commonwealth and the Town of Chatham will file all pre-filed direct testimony which they intend to introduce at the adjudicatory hearing.

The hearing will commence within one month from the filing of all pre-filed direct testimony. The hearing record will close fourteen business days from the later to occur of the end of the hearing or the issuance by the MEPA office of a final Environmental Impact Report.

A decision will be issued within sixty days from the date that the hearing record closes.

It is within such administrative law judge's discretion to determine whether the hearing on the appeal of the Superseding Order of Conditions will be bifurcated from the hearing of the appeal of the variance denial.

[LOGO]Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of
Environmental Protection
William F. Weld
Governor
Trudy Coxe
Secretary, EOEA
Thomas B. Powers
Acting Commissioner

March 25, 1994

In the Matter of ALFRED B. NELSON	Docket No. 92-140 File No. SE 10-987 Docket No. 93-090 (Variance Denial) CHATHAM
In the Matter of LEWIS W. HICKS	Docket No. 92-152 File No. SE 10-1027 Docket No. 93-089 (Variance Denial) CHATHAM

DECISION ON BIFURCATION

In accordance with the February 24, 1994 Consolidation and Bifurcation Order, the parties are hereby advised that the Department's request with respect to bifurcation of this adjudicatory hearing is GRANTED. Specifically, I have determined that, in the interests of administrative efficiency, it is advisable to hear and decide the permit appeals before commencing that phase of the hearing

pertaining to the variance appeals. Accordingly, the parties are advised that:

1. The Scheduling Order issued on February 24, 1994, including the references therein to the filing of prefiled direct testimony, shall be interpreted to apply solely to the permit appeals phase (hereinafter, "Phase I") of this hearing;

2. A decision with respect to Phase I shall be issued as expeditiously as possible after the close of the record with respect to that pahse;

3. Should the petitioners prevail with respect to Phase I, the variance denials will become moot. Should the petitioners not prevail, the prehearing conference with respect to scheduling the variance appeals phase (hereinafter, "Phase II") of the hearing shall be held as expeditiously as possible.

/s/ M. Kathryn Sedor
M. Kathryn Sedor
Administrative Law Judge

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS SUPERIOR COURT
C.A. 90-1712

ALFRED NELSON, EVELYN NELSON,
LEWIS HICKS, III, AND BERNICE HICKS,
Plaintiffs

V.

COMMONWEALTH OF MASSACHUSETTS
AND TOWN OF CHATHAM,
Defendants

AFFIDAVIT OF WALTER F. BOHLEN, Ph.D.

Before me, the undersigned authority, personally appeared Walter F. Bohlen, who upon oath and after being duly sworn, deposes and says:

1) I am Walter F. Bohlen. I am a Professor at the Department of Marine Sciences at the University of Connecticut. I am an expert in coastal sediment transport processes.

2) I am familiar with the history of flooding and erosion at Chatham Harbor, Chatham, Massachusetts. I have inspected the plaintiffs' properties and the Chatham Harbor area on several occasions, both before and immediately after the storm of October 30-31, 1991.

3) Plaintiffs' properties suffered serious erosion during the storm of October 30-31, 1991. Storm water passed inland beyond the home of plaintiff Alfred Nelson. The storm destroyed dunes in front of plaintiffs' properties. Sand added to Nelson's property at the high water mark in spring, 1991, is gone. The slope of the beach in front of the properties was reduced, indicated

that most protection provided by the beach against further flooding is lost.

4) Plaintiffs' properties have almost no protection from severe winter storms.

5) Given the ocean forces present at Chatham Harbor, only seawalls can protect plaintiffs' properties.

6) Properly constructed seawalls will protect plaintiffs' properties without causing damage to outlying properties.

7) Every coastal state in the northeastern United States experiences a net loss of coastal sand as (1) more beaches are eroding than not and (2) eroded sand tends to go out sea. Over the last ten years, more than fifty percent of Massachusetts beaches have lost sand.

8) The apparent stability of the minority of beaches is achieved at the cost of erosion from the majority of beaches. As eroding beaches become unable to put more sand into the system, the once "stable" beaches begin to erode.

Signed under the pains and penalties of perjury.

/s/ Walter F. Bohlen
Walter F. Bohlen

STATE OF CONNECTICUT

Groton, ss. Date: November 11, 1991

Subscribed and sworn to before me, the undersigned Notary Public.

/s/ Yolanda D. Beers
Notary Public

Comm. Exp.: 3/31/93
YOLANDA D. BEERS
NOTARY PUBLIC
MY COMM. EXPIRES
MARCH 31, 1993

PHASE I
DRAFT ENVIRONMENTAL IMPACT REPORT
SHORE PROTECTION STRUCTURES
AUNT LYDIAS COVE SOUTH TO
BEACH AND TENNIS CLUB
CHATHAM, MA

JANUARY 1993

PREPARED FOR THE TOWN OF CHATHAM
COASTAL EROSION ADVISORY COMMITTEE

BY

AUBREY CONSULTING, INCORPORATED
SUITE 2-3
350 GIFFORD STREET
FALMOUTH, MA 02540
(508) 457-0810

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PHASE 1
DRAFT ENVIRONMENTAL IMPACT REPORT
SHORE PROTECTION STRUCTURES
AUNT LYDIAS COVE SOUTH TO
BEACH AND TENNIS CLUB
CHATHAM, MA

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4-12: Shoreline sections protected by coastal structures. 41

4-13: Properties protected by coastal structures. 42

5-1: Schematics of various sediment transport scenarios due to inlet position. 49

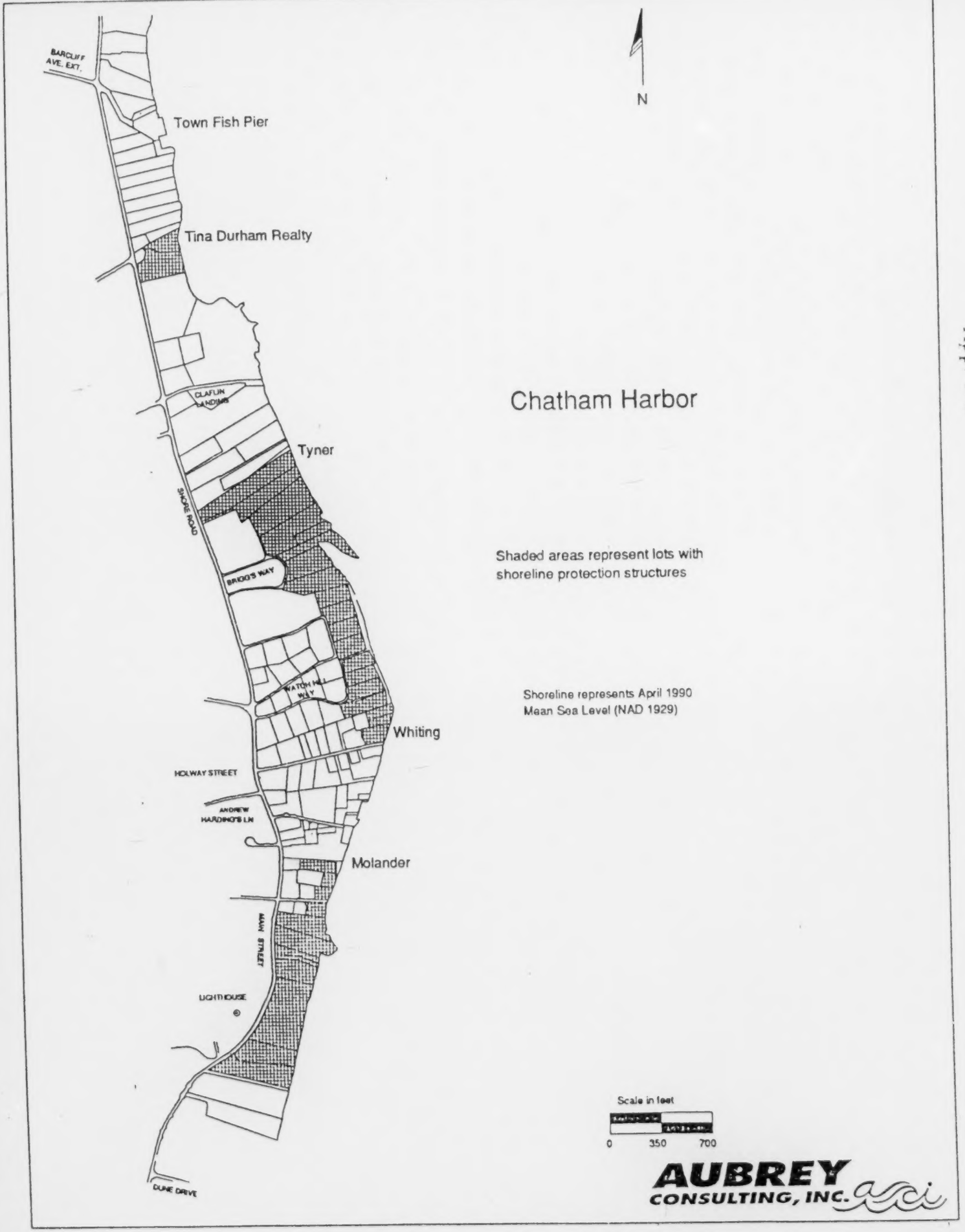

Figure 4-13: Properties protected by coastal structures.

6.0 ENVIRONMENTAL MITIGATION ALTERNATIVES ANALYSIS

6.1 Introduction

Because of the unique character of this Phase I EIR, namely providing environmental information to the permitting process following construction of emergency measures, this EIR follows a slightly different analysis procedure than most. Most EIR's require a thorough assessment of alternatives for the project. However, since this EIR covers only existing seawalls, permitted under emergency action, there is no need to describe alternatives to constructing the seawalls. As agreed to at a conference with regulatory personnel from MEPA and MCZM, held in Boston on 29 June 1992, this EIR addresses mitigation alternatives instead of project alternatives. After analysis of mitigation alternatives, a recommended alternatives mix is provided.

Where possible, we have indicated "trigger conditions," when some occurrence mandates implementation of an option at some time in the future. This adaptive plan provides much more effective management of Chatham Harbor than that possible if all options were to be implemented immediately.

* * *

Appendix 1

MEPA, MCZM and DEP letters

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
100 Cambridge Street, Boston, 02202

[seal]

WILLIAM F. WELD
GOVERNOR
ARGEO PAUL CELLUCCI
LIEUTENANT GOVERNOR
SUSAN F. TIERNEY
SECRETARY

(617) 727-9800
November 25, 1991

Mr. Thomas W. Joy, P.E.
Coastal Engineering Co.
260 Cranberry Highway
Orleans, MA 02653

Re: EOEA#7345/8133 Shorefront Protection – Chatham Breach/Nelson – Artificial Dune – 1991 emergency status

Dear Mr. Joy:

The purpose of this letter is to request an update from you on preparation of the Environmental Impact Report (EIR) that has been required for the construction of certain coastal protection structures in Chatham. As you know, following the breach of the Nauset Barrier in 1987, the Secretary of Environmental Affairs received several emergency requests under the Massachusetts Environmental Policy Act from landowners in Chatham for the construction of coastal protection structures. These structures needed several state agency approvals from DEP/Waterways, DEP/SE/Wetlands, DEP/WPC and

MCZM. These proposals exceeded the MEPA thresholds and required MEPA compliance prior to state action. The Secretary approved those emergency requests under MEPA regulation 301 CMR 11.11.

* * *

As far as the scope of the EIR is concerned, the only change from the 1988 and 1990 Certificates is that, for those properties where emergency structures have already been constructed, alternatives need not be considered. However all properties must be evaluated for mitigation to compensate for the loss of sediments from the eroding bank to the beach and nearshore system. Alternatives analysis is needed for all proposed structures not yet constructed, and any further protection proposed where emergency structures have been constructed (i.e., if protection is planned to a greater height, or if additional toe protection is needed). Perhaps the most important issue to be addressed is the evaluation of the significance of impacts to the identified gaps in the coastal protection and development of a mitigation plan to minimize those impacts. The mitigation will probably be needed until the breach migrates to the south and the specific section of shoreline again becomes an accretion zone.

* * *

Sincerely,

/s/ Janet McCabe
Janet McCabe, Director
MEPA Unit

JM/DES/ds

enclosures: EOEA #7345 Scope – 10/27/88
EOEA #8133/7345 Scope – 3/14/90
EOEA Letter of 12/9/88 re: Emergency Authorizations
DEP/Waterways Application List
EIT Information – 3/29/90
MCZM comments – 3/15/91
DEP/WRP – 3/11/91

cc: EIT
MCZM
DEP/Waterways
DEP/SE/Wetlands
DEP/Boston/Wetlands
DEP/WPC/Boston
Mass. Attorney General
CCC
Chatham Conservation Commission
All Property Owners Referenced

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS SUPERIOR COURT
C.A. 90-1712

ALFRED NELSON, EVELYN NELSON,
LEWIS HICKS, III, AND BERNICE HICKS,
Plaintiffs

v.

COMMONWEALTH OF MASSACHUSETTS
AND TOWN OF CHATHAM,
Defendants

AFFIDAVITS OF OLE SECHER MADSEN, Sc.D.

Before me, the undersigned authority, personally appeared Ole Secher Madsen, who upon oath and after being duly sworn, deposes and says:

1) I am Ole Secher Madsen. I am a Professor at the Department of Civil Engineering at the Massachusetts Institute of Technology, Cambridge, Massachusetts. I am an expert in coastal sediment transport.

2) Given the ocean forces and conditions present at Chatham, only seawalls offer viable protection for plaintiffs' properties.

3) Seawalls will protect plaintiffs' properties without causing damage to outlying properties.

4) Every coastal state in the northeastern United States experiences a net loss of coastal sand as (1) more beaches are eroding than not and (2) all eroded sand eventually goes out to sea.

5) The apparent stability of the minority of beaches is achieved at the cost of erosion from the majority of

beaches. As eroding beaches become unable to put more sand into the system, the once "stable" beaches begin to erode.

6) Eroding sand moves down as it goes out to sea. When the same sand moves landward, it moves up along the slope of the beach. Even on a gentle slope (10 feet down per hundred feet offshore), one third less sand will return to the beach.

7) Massachusetts wetland regulations assume that the above-stated erosion pattern is a system of flood protection. This is incorrect. Massachusetts' coastal erosion sacrifices sand from eroding beaches without permanently protecting other areas.

8) Massachusetts wetland regulations make a distinction between "dune sand" and "coastal bank" which is extreme and unjustified. It is difficult to distinguish between the materials, particularly along the coast where they tend to be mixed. Any difference in their erosion-resisting properties is insignificant.

9) Making seawall construction dependent on the difference between "dune sand" and "coastal bank" produces gaps between seawalls in flood areas. This leads to "flanking" of the walls by water. Not only is this dangerous, but the dune sand is usually in such small quantities as to have no meaningful impact on flooding.

10) Seawalls do not cause erosion. They prevent sediment behind them from being eroded and they can interfere with the transport of sediment by littoral drift in a small way. Generally these problems are minor because

without the wall flooding will overcome any sand the wall might have blocked.

11) A properly designed and constructed seawall can, if properly maintained, last several centuries or more.

Signed under the pains and penalties of perjury.

/s/ Ole Secher Madsen
Ole Secher Madsen

COMMONWEALTH OF VIRGINIA

York, ss. Date: 12 November 1991

Subscribed and sworn to before me, the undersigned Notary Public.

/s/ Sarah R. Hamrick
Notary Public

Comm. Exp.: 28 February 1994

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss SUPERIOR COURT
No. 90-1712

ALFRED NELSON, EVELYN NELSON, LEWIS HICKS, III, and BERNICE HICKS,

Plaintiffs,

v.

COMMONWEALTH OF MASSACHUSETTS
THE TOWN OF CHATHAM,

Defendants.

AFFIDAVIT OF BENNO BRENNINKMEYER

I, Benno Brenninkmeyer, do depose and say:

1. My name is Benno Brenninkmeyer. I am an associate professor in the Department of Geology and Geophysics at Boston College. I obtained my Ph.D. in Geological sciences from the University of Southern California. For the past twenty years, I have taught courses in Oceanography, Marine Geology, Coastal Geology, Sedimentation, and Geostatistics at both the graduate and undergraduate levels. I have studied coastal processes for the United States Army Corps of Engineers, the United States Park Service, the National Science Foundation, and the Federal Emergency Management Agency. On behalf of the United States Navy, I have studied the movement of sand and coarser particles on beaches, dunes, inlets,

and the near shore for the past twenty years. I have also led long term expeditions to study sedimentation processes along the coasts of Massachusetts, New Hampshire, Florida, Delaware, North Carolina, Louisiana, California, Oregon, Iceland and Holland. I have included as *Exhibit A* to this affidavit, a copy of my resume which more fully details my education and experience.

* * *

3. The Massachusetts coastline is a valuable and scarce resource. Indeed, if all the people who live within an hour's drive were to go down to the beach on any given day, they would have a total of eleven square inches to spread their blanket or towel.

4. This scarce resource is in danger. Eleven percent of the Massachusetts coastline is critically eroding; eighty-six percent is eroding to a lesser extent. This erosion can be exacerbated if coastal property owners place structures on their properties that interfere with natural coastal processes. I shall describe these processes below.

* * *

Signed under the penalties of perjury this 28th day of February, 1992.

/s/ Benno Brenninkmeyer
Benno Brenninkmeyer

LOGO Commonwealth
of Massachusetts

FORM 300
[SEAL]
Chatham Beach & Tennis Club Notice of Intent (excerpt) File NO. SE-10 919

City/Town Chatham

Assistant Chatham Beach & Tennis Club

Notice of Intent
Under the
Massachusetts Wetlands Protection Act,
G.L. c. 131, § 40
and
Application for a Department of the Army Permit

Part I: General Information

1. Location: Street Address Main Street Lot Number 73, 74 Assessors Map 16B

2. Project: Type To alter Description To reconstruct and replace existing rock revetment for shorefront protection

3. Registry: County Barnstable Current Book 458 & Page 533

   Certificate (if Registered Land) ____

4. Applicant Chatham Beach & Tennis Club Tel. 945-0999
   c/o E. Melson Webster

   Address 90 Old Harbor Road Chatham, MA 02633

5. Property Owner same as applicant Tel. ____

   Address _____

6. Representative Coastal Engineering Co., Inc. Tel. 255-6511

   Address 260 Cranberry Highway Orleans, MW 02653

7. a. Have the Conservation Commission and the Department's Regional Office each been sent, by certified mail or hand delivery, 2 copies of completed Notice of Intent, with supporting plans and documents?

   Yes [X] No [ ]

   b. Has the fee been submitted?

   [X] Yes [ ] No

   c. Total Filing Fee Submitted $670.00

   d. City/Town Share of Filing Fee $347.50
   (sent to City/Town)
   State Share of Filing Fee $322.50
   (½ of fee in excess of $25, set to DEP)

   e. Is a brief statement attached indicating how the applicant calculated the fee? [X] Yes [ ] No

8. Have all obtainable permits, variances and approvals required by local by-law been obtained?

   Yes [X] No [ ]

Obtained:	Applied For:	Not Applied For:
	None applicable at this time.	

9. Is any portion of the site subject to a Wetlands Restriction Order pursuant to G.L. c. 131, § 40A or G.L. c. 130, § 105? Yes [ ] No [X]

10. List all plans and supporting documents submitted with this Notice of Intent.

Identifying Number/Letter	Title, Date
R-1	Proposed Shorefront Protection 1/2/91

11. Check those resource areas within which work is PROPOSED:

(a) [ ] Buffer Zone

(b) Inland:

[ ] Bank*
[ ] Bordering Vegetated Wetland*
[ ] Land Under Water Body & Waterway*

Land Subject to Flooding
[ ] Bordering
[ ] Isolated

(c) Coastal:

[ ] Land Under the Ocean*
[ ] Coastal Beach*
[ ] Barrier Beach
[ ] Rocky Intertidal Shore*
[ ] Land Under Salt Pond*
[ ] Fish Run*

[ ] Designated Port Area*
[XX] Coastal Dune
[XX] Coastal Bank
[ ] Salt Marsh*
[ ] Land Containing Shellfish*

---

* Likely to involve U.S. Army Corps of Engineers concurrent jurisdictions. See General Instructions for Completing Notice of Intent.

CHATHAM
North Chatham
Great Hill
Lovers Lake
Tidal Flat
Old Cems
Emery Pond
Chatham Municipal Airport
Peoples Cem
Gravel Pit
Tern Island
Gravel Pit Cranberry Bog
Union Cem
Seaside Cem
Perch Pond
White Pond
Blue Pd
Black Pd
Bear Pond
Black Pond
Aunt Lydias Cove
West Chatham
Chatham
Oyster Pond
Long Pt
Stetson Cove
Little Mill Pond
Mill Pond
Oyster Pond River
The Neck
Chatham Lighthouse
Toms Neck
Mitchell River
Sears Pt
Stage Harbor
Stage Island
Harding Beach
Harding Beach Pt
Morris Island
Quitnesset
Radio Tower
Light
CHATHAM ROADS
CHATHAM HARBOR
NANTUCKET
Tidal Flat
CHATHAM QUADRANGLE
App. 185

TOWN OF CHATHAM

Conservation Commission

FINDINGS ON APPLICATION FOR PERMIT UNDER WETLANDS PROTECTION BY-LAW

FORM 505
FILE NUMBER
SE -10 919

DATE OF ISSUANCE
July 25, 1991

AMENDED ORDER OF CONDITIONS

APPLICANT: Chatham Beach and Tennis Club

ADDRESS: c/o Melson Webster
90 Old Harbor Road
Chatham, Mass. 02633

OWNER: _____

(If other than applicant)

ADDRESS: _____

LOCATION OF WORK: Lots 73 & 74 Main Street, Chatham

After public hearing in accordance with open meeting law M.G.L. Ch. 39, s. 23B, closed on February 6, 1991, the Chatham Conservation Commission, in accordance with the Town of Chatham Wetlands By-Law finds:

[X] Permit is granted – work may proceed;

[ ] Permit is denied;

Conservation Commission:

/s/ Douglas B. Wells
/s/ Stuart Moore
/s/ Paul Chamberlin
/s/ Illegible

EXHIBIT 17

Saving The American Beach:
A Position Paper by Concerned
Coastal Geologists

SAVING THE AMERICAN BEACH:

A POSITION PAPER BY

CONCERNED COASTAL GEOLOGISTS

Results of the Skidaway Institute of Oceanography Conference on America's Eroding Shoreline: The need for geologic input into shoreline management, decisions and strategy

25-27 March, 1981

Savannah, Georgia

Conveners:

Dr. Orrin H. Pilkey, Jr., Duke University, Durham, N.C. 27708

Dr. James D. Howard, Skidaway Inst. of Oceanography, Savannah, Ga. 31406

Participants:

Dr. Benno Brenninkmeyer, Boston College, Chestnut Hill, Ma. 02167

Dr. Robert W. Frey, University of Georgia, Athens, Ga. 30602

Dr. Albert C. Hine, University of South Florida, St. Petersburg, Fla. 33701

Dr. John C. Kraft, University of Delaware, Newark, Del. 19711

Dr. Robert Morton, Bureau of Economic Geology, Austin, Tx. 78712

Dr. Dag Nummedal, Louisiana State University, Baton Rouge, La. 70803

Dr. Harold Wanless, University of Miami, Miami, Fla. 33139

* * *

4. Economic and Political Alternatives

Prevent the use of public funds for redevelopment after the "next" storm –

Destruction of shoreline development by a storm is essentially the only way that artificial stabilization can be halted or reversed. Thus storms on the one hand sow tragedy and destruction but on the other hand, they offer a golden opportunity to reverse beach management strategies that have failed.

Dauphin Island, Alabama has been affected by 20 hurricanes during this century. Three (1916, 1947, 1979) provided maximum damage at the same place, a location controlled by nearshore bathymetry which focuses storm wave energy. The taxpayer paid millions of dollars in Flood Insurance payments for Dauphin Island buildings that were destroyed by Hurricane Frederic in 1979. We taxpayers have just commited well over 50 million dollars to build a new bridge and to reestablish the major development of Dauphin Island at this most senseless of all locations.

There is immediate need for measures to prevent redevelopment after storms. No longer should local, state, and federal governments expend public funds in redevelopment; on the contrary, these governments should assume responsibility for the protection of the

public (as opposed to the private) interest, not to recreate an untenable situation or to guarantee recurrent destruction of such properties.

* * * * *

1. People are directly responsible for the "erosion problem" by constructing buildings near the beach. For practical purposes, there is no erosion problem where there are no buildings or farms.

* * *

Restatement (Second) of Torts, Section 822, Comment g

* * *

Intentional invasions – unreasonableness. Intentional invasions are defined in § 825. The rules for determining when an intentional invasion is unreasonable are stated in §§ 826-831. The special application of these rules to the case in which the defendant's conduct was solely for the purpose of causing the invasion is found in § 829.

Not every intentional and significant invasion of a person's interest in the use and enjoyment of land is actionable, even when he is the owner of the land in fee simple absolute and the conduct of the defendant is the sole and direct cause of the invasion. Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another. Liability for damages is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation. (See

§ 829A). In respect to unintentional invasions of another's interests, certain broad general principles of liability have been developed. These principles are embodied in the rules governing liability for negligent, reckless and abnormally dangerous conduct and apply to unintentional invasions of interests in the use and enjoyment of land as well as to other interests. In respect to intentional invasions of interests, however, there are no broad general principles of liability applicable to different types of interests. In respect to certain types of interests, such as those in bodily security and in the exclusive possession of land, the law has developed strict rules of liability for intentional invasions, qualified by specific privileges. In respect to interests in the use and enjoyment of land, however, the law has developed a broader, more indefinite and more comprehensive, rule of liability for intentional invasions. This rule is expressed in terms of unreasonableness and, as stated in this Section, requires that an intentional invasion be unreasonable before one is liable for causing it.

* * *

Massachusetts General Laws,

Chapter 231A, Sections 1 – 3

§ 1. Power to make declaratory determination; jury questions

The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issues which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with

proper instructions by the court, whether a general verdict be required or not.

---

§ 2. Controversies to which declaratory judgment procedure is applicable

The procedure under section one may be used to secure determinations of right, duty, status or other legal relations under deeds, wills or written contracts or other writings, constituting a contract or contracts or under the common law, or a charter, statute, municipal ordinance or by-law, or administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination. Said procedure under section one may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of the commonwealth, or are in violation of rules or regulations promulgated under the authority of such laws, which violation has been consistently repeated; provided, however, that this section shall not apply to the governor and council or the legislative and judicial departments. For the purpose of this section practices or procedures mean the customary and usual method of conducting municipal, county, state agency or official business.

The foregoing enumeration shall not limit or restrict the exercise of the general powers conferred in section one in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

---

§ 3. Grounds for refusing declaratory judgment

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings or for other sufficient reasons. The reasons for such refusal shall be stated in the record. The failure to exhaust administrative relief prior to bringing an action under section one shall not bar the bringing of such action if the petition for declaratory relief is accompanied by an affidavit stating that the practice or procedure set forth pursuant to the provisions of section two is known to exist by the agency or official therein described and that reliance on administrative relief would be futile. For the purposes of this section practice or procedure means the customary and usual methods of conducting agency or official business.